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## The Tax-Immigration Nexus

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# THE TAX-IMMIGRATION NEXUS

TESSA DAVIS<sup>†</sup>

## ABSTRACT

Tax and immigration law have a shared interest in defining community. In order to implement a tax, we must know who belongs to the taxable community. At the same time, immigration law must define and administer the requirements for membership in the national community. Despite the differing objectives of tax and immigration law—raising revenue and deciding who may enter, remain, and become a citizen in the United States, respectively—both of these regimes uses a concept of citizenship to define their respective communities.

Starting from this common thread of the relevance of citizenship to both immigration and tax law, this Article draws upon social theory on citizenship to explore the many links between these seemingly disparate areas of law. Examination of these connections—what this Article calls the tax-immigration nexus—reveals that both areas of law draw upon the other to define citizenship. The interplay of tax and immigration citizenship yields important insights for tax law and policy.

One of these insights is that the use of tax compliance as a factor in immigration status, for example, revoking green card status for certain violations of the tax code, is inconsistent with widely-held objections to the taxation of U.S. citizens living abroad. Both green card holders and U.S. citizens living abroad represent examples of people who blur the line between citizen and noncitizen and their similarities and dissimilarities compel re-evaluation of the current tax regime. This Article argues that there are good reasons to treat potential taxpayers who occupy this blurred space in a consistent manner. Along that line, this Article posits possible reforms to the taxation of lawful permanent residents that would help resolve the inequities within the tax-immigration nexus, as well as avenues for further research.

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## TABLE OF CONTENTS

INTRODUCTION .....	196
I. COLLATERAL CONSEQUENCES: TAXATION, CITIZENSHIP, AND IMMIGRATION LAW .....	202
II. BEYOND LEGAL STATUS: THEORIZING CITIZENSHIP .....	208
III. DEFINING THE TAX-IMMIGRATION NEXUS .....	216
A. <i>Citizenship in Immigration Law</i> .....	216
1. Grounds for Removal: Tax Crimes as Aggravated Felonies and Crimes of Moral Turpitude .....	219
2. Grounds for Removal: Taxation and “Good Moral Character” .....	222
B. <i>Citizenship in Tax Law</i> .....	227
1. Tax Law’s Direct and Indirect Connections to Immigration Law .....	228
2. Benefits and Tax—The Relevance of <i>Cook v. Tait</i> .....	231
IV. A NEW APPROACH TO UNDERSTANDING CITIZENSHIP AND TAXATION .....	238
A. <i>Benefit Theory, the Tax-Immigration Nexus, and the CBT         Debate</i> .....	238
B. <i>Inequities of the Tax-Immigration Nexus: A Way Forward</i> .....	242
1. Considering an Immigration Law Solution .....	243
2. Reducing the Likelihood of Tax “Footfalls” .....	244
3. Tax Credit for Naturalization Costs .....	246
4. Tax Rates .....	249
C. <i>A Note on Salience and the Tax-Immigration Nexus</i> .....	253
CONCLUSION .....	254

[I]f one sees law as exclusively concerned with the rules that regulate disputes, rather than as a realm in which a society and its members envision themselves and their connections to one another . . . then the reification of our momentary view of how the world is composed will triumph over our need to understand it from afar.<sup>1</sup>

## INTRODUCTION

Citizenship confers rights and responsibilities.<sup>2</sup> The scope of those rights and responsibilities is the focus of scholars across an array of disciplines. *Citizen* and *citizenship*—these terms are powerful markers of an individual’s status that influence the extent to which she belongs to a

1. LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* xii (2006).

2. So frequently stated as to rise to the level of truism, stated examples of this idea are nearly ubiquitous in the relevant literature. For one of many, see Thomas Faist, *Shapeshifting Citizenship in Germany: Expansion, Erosion and Extension*, in *THE HUMAN RIGHT TO CITIZENSHIP: A SLIPPERY CONCEPT* 193, 195 (Rhoda E. Howard-Hassmann & Margaret Walton-Roberts eds., 2015) (“[C]itizenship comprises equal rights and obligations for all full members. . . . Obligations comprise, for instance, tax liability . . .”).

community and the rights and responsibilities that she may exercise and must uphold. The inclination may be to assume that citizenship is within the purview of immigration and naturalization law<sup>3</sup> with no relationship to taxation. Citizenship is, however, a key point of connection between these two areas of law.

Immigration law, by defining and policing the requirements of citizenship, governs how an individual gains entry into and formal membership in the national community.<sup>4</sup> Tax law is similarly interested in community, namely the taxable community, and frequently uses citizenship to define that community.<sup>5</sup> At times the immigration and tax concepts of citizenship overlap, and at other points they diverge. This Article explores the ties between immigration and tax and their two distinct but overlapping concepts of citizenship, labeling the space created by such overlap the *tax-immigration nexus*.

To begin to understand the tax-immigration nexus, consider the example found in the recent Supreme Court case of *Kawashima v. Holder*.<sup>6</sup> The case involved two lawful permanent residents who pled guilty to a criminal tax offense.<sup>7</sup> Lawful permanent resident (LPR) is the immigration law label for individuals colloquially known as “green card holders.” LPRs are then, in short, authorized immigrants who have lived in the United States for an extended period and may remain if they continue to comply with certain laws. Though LPRs may apply to become naturalized citizens after meeting statutorily prescribed requirements, they are not citizens under immigration law. Tax law takes a different view, however.

Under current law, the Internal Revenue Code (the Code) defines LPRs as “resident aliens,”<sup>8</sup> drawing them into a category this Article terms “tax citizens.” As tax citizens, LPRs are part of the taxable community and subject to the same laws and rates as individuals who are born or naturalized citizens (hereinafter referred to as “formal citizens”). A tax citizen should be distinguished from another class of individuals the Code terms “nonresident aliens.” Nonresident aliens are taxable only on their income that can be “sourced” as U.S. income.<sup>9</sup> An individual

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3. Throughout the rest of this Article, I use “immigration law” to encompass both immigration and naturalization law.

4. U.S. CONST. amend. XIV, § 1 (providing that all individuals born or naturalized in the United States are citizens of the United States). See generally Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2012) (continuing where the 14th Amendment left off and fleshing out the naturalization process).

5. See discussion *infra* Section III.B.

6. 565 U.S. 478 (2012).

7. For a full discussion of *Kawashima v. Holder*, see *infra* Part I.

8. I.R.C. § 7701(b)(1)(A) (2012).

9. Source rules help in the often challenging task of determining the location of and appropriate taxing jurisdiction for a given bit of income. See, e.g., REUVEN S. AVI-YONAH ET AL., U.S. INTERNATIONAL TAXATION 31 (3d ed. 2011) (“The source rules are provisions of the Code (and tax treaties) that designate rules for assigning income to a particular jurisdiction.”).

may, then, be a tax citizen without being a formal citizen.<sup>10</sup> This disjunct between the immigration concept of citizenship and tax citizenship was the root of the challenges the LPRs faced in *Kawashima* and is the point of focus of this Article.

*Kawashima* is essentially a relatively technical statutory interpretation case. In the case, the Supreme Court had to interpret a specific paragraph of the Immigration and Nationality Act that defines so-called “aggravated felonies.” An LPR found guilty of an aggravated felony may be removed *at any point after being admitted to the United States*.<sup>11</sup> In contrast, an LPR found guilty only of a crime of moral turpitude—a category of crimes that is distinct from but overlaps with aggravated felonies—may be removed, on the basis of that crime, in a more limited time frame after admission or after commission of multiple offenses.<sup>12</sup> The Court held that the tax offense to which the *Kawashimas* pled guilty qualified as an aggravated felony, thereby rendering the *Kawashimas* deportable even after they served their time for the offense.

*Kawashima* marked an expansion of the range of tax crimes that count as aggravated felonies for the Immigration and Nationality Act (the INA), but it did not create the tax-immigration nexus. Immigration law has, for decades, used tax offenses as proxies for identifying individuals who are or will be “good citizens”—who behave as we believe citizens behave (or should). By being in the vulnerable position of tax citizens who share the same tax responsibilities as formal citizens but who lack formal citizenship, the *Kawashimas*, and all other LPRs, reside in an insecure space. The government demands the same compliance of LPRs as it does formal citizens but it punishes LPRs’ noncompliance much more severely.

The core questions raised by *Kawashima*, specifically, and the tax-immigration nexus, generally are: What is the proper relationship between tax law and immigration? When does being a good tax citizen come to bear on formal citizenship? Does it follow that a “bad” tax citizen makes a bad formal citizen? Who is worthy of citizenship? Of permanent, full membership in the American community? *Kawashima*, and

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10. The reverse does not follow. Though a formal citizen may not have positive tax liability, she remains a “tax citizen” as defined by this paper—an individual subject to tax on her worldwide income. Under current law, the U.S. government asserts the right to tax a U.S. citizen on her worldwide income unless she renounces or loses that citizenship, a fact that may trigger a set of exit rules. See generally I.R.C. §§ 877, 877A (2012), for the language of the expatriation taxes. Additionally, see *infra* Section III.B for a discussion of the current tax regime as applied to tax citizens.

11. 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (defining one class of removable aliens as “[a]n alien who is convicted of an aggravated felony at any time after admission is deportable”).

12. *Id.* § 1227(a)(2)(A)(i) (defining one class of removable aliens as “[a]ny alien who—(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable”).

the recognition of the tax-immigration nexus that it strengthens, illustrates that both tax and immigration law have something to say on these issues.

Much of the recent scholarship on taxation and citizenship in the United States explores the long-arm of the U.S. Internal Revenue Code.<sup>13</sup> Unlike most nations, the United States employs citizenship-based taxation on worldwide income. If you are a citizen, your income, wherever earned, is taxable.<sup>14</sup> Through the resident alien category, the Code renders certain noncitizens as tax citizens, making them taxable on the same terms as born or naturalized citizens. Lastly, nonresident, noncitizens are taxed on their United States source income, a tax concept defined by multiple authorities. The result is an aggressive system of taxation that constructs both citizens and noncitizen residents as tax citizens. More pointedly, whether the individual has the full benefits, however conceived, of U.S. citizenship, she may bear one of its burdens: to pay income tax.

Five distinguishable communities exist within the current regime and scholarship on citizenship-based taxation: resident citizens, nonresident citizens, LPRs, noncitizens who qualify as tax residents who are not LPRs,<sup>15</sup> and noncitizen, nonresidents. Though some scholars defend citizenship-based taxation, an increasing number criticize the system as un-

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13. For comprehensive discussion of citizenship and taxation, see generally Allison Christians, *Drawing the Boundaries of Tax Justice*, in *QUEST FOR TAX REFORM CONTINUES: THE ROYAL COMMISSION ON TAXATION 50 YEARS LATER* 53, 53 (Kim Brooks ed., 2013); Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, *TAX NOTES INT'L*, May 2010, at 680; Cynthia Blum & Paula N. Singer, *A Coherent Policy Proposal for U.S. Residence-Based Taxation of Individuals*, 41 *VAND. J. TRANSNAT'L L.* 705 (2008); Mark S. Hoose, *Trading One Danger for Another: Creating U.S. Tax Residency While Fleeing Violence at Home*, 12 *FLA. TAX REV.* 827 (2012); Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 *FLA. TAX REV.* 117 (2014) [hereinafter Kirsch, *Revisiting the Tax Treatment of Citizens Abroad*]; Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 *N.Y.U. L. REV.* 443 (2007) [hereinafter Kirsch, *Taxing Citizens in a Global Economy*]; Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 *HARV. LATINO L. REV.* 1 (2006); Ruth Mason, *Citizenship Taxation*, 89 *S. CAL. L. REV.* 169 (2016); Philip F. Postlewaite & Gregory E. Stern, *Innocents Abroad? The 1978 Foreign Earned Income Act and the Case for Its Repeal*, 65 *VA. L. REV.* 1093 (1979); Renée Judith Sobel, *United States Taxation of Its Citizens Abroad: Incentive or Equity*, 38 *VAND. L. REV.* 101 (1985); Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 *IOWA L. REV.* 1289 (2011); Almaz Zelleke, *Basic Income in the United States: Redefining Citizenship in the Liberal State*, 63 *REV. SOC. ECON.* 633 (2005); Notably, scholars have also explored the impact of citizenship status on the provision of benefits through the tax code, such as the Earned Income Tax Credit.

14. I use taxable rather than taxed deliberately. Importantly, due to international law norms, treaties, and substantive tax law in the form of credits and an exemption, the determination that income is taxable does not mean it will be taxed. See generally *I.R.C. §§ 901, 911* (2012). The tax treatment of citizens and noncitizens, whether resident or nonresident, will be discussed *infra* Section III.B.

15. Both LPRs and resident noncitizens who are not LPRs fall under the category of "resident alien" defined in *I.R.C. § 7701(b)(1)(A)* (2012), unless an exception applies. A nonresident noncitizen is, in the language of tax, a nonresident alien per *§ 7701(b)(1)(B)*.

fair and inefficient,<sup>16</sup> citing particular concern for nonresident citizens.<sup>17</sup> This Article focuses instead on the tax treatment of noncitizens, specifically LPRs—a group that has received little scholarly attention—as another instructive group in evaluating the tax-immigration nexus and its implications for tax law and policy.

To fully conceptualize the tax-immigration nexus requires expanding our concept of citizenship with the help of social theory. Immigration law uses culturally contingent concepts of what constitutes a citizen. Tax law uses both formal, objective notions of citizenship and, I will argue, informal, culturally contingent constructions of citizenship.<sup>18</sup> Formal citizenship is sufficient to exercise the power to tax but is not necessary. As in the case of the Kawashimas, an individual may become a taxpayer because of her formal status governed by immigration law or because of a determination that she behaves as a citizen per the Code.

Identifying the depth and breadth of the tax-immigration nexus reveals that tax law is more bludgeon than not. Citizenship-based taxation and the characterization of tax noncompliance as deportable offenses or offenses showing poor moral character both rely heavily upon a clear benefit/tax nexus. As a citizen or potential citizen, you receive benefits from the government for which you must pay. Under this approach, the role of tax law in constructing citizenship is essentially a one-way street. Failure to pay taxes may result in denial of citizenship status but compliance is simply a bare minimum requirement on a path toward citizenship. In its definition of resident alien, the Code severs any necessary ties between the concept of tax citizenship and formal citizenship. A practical result of this *tax citizen* status is the heaping of one of the most salient burdens of citizenship on noncitizens without conveying the full benefits of citizenship. Stated differently, paying income tax does not make an individual a citizen, but you will be hard-pressed to avoid paying for benefits you are considered to have received.

The tax-immigration nexus places tax in the familiar but challenging position of being both revenue raiser and tool of social policy. While the dual role is acceptable or even appropriate in other areas, such as

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16. Compare Mason, *supra* note 13 (criticizing the system as unfair and inefficient), with Kirsch, *Revisiting the Tax Treatment of Citizens Abroad*, *supra* note 13 (offering an argument in favor of citizenship taxation).

17. The Foreign Account Tax Compliance Act (FATCA) has only strengthened the sense of urgency of this discussion. See, e.g., Am. Citizens Abroad, Residence-Based Taxation: A Necessary and Urgent Tax Reform 3 (Apr. 2015) (unpublished proposal submitted to the Senate Fin. Comm. Individual Income Tax & Int'l Working Grps.), [https://www.americansabroad.org/media/files/files/9960ba5d/ACA\\_RBT\\_proposal\\_for\\_submission\\_to\\_Senate\\_Finance\\_April\\_2015.pdf](https://www.americansabroad.org/media/files/files/9960ba5d/ACA_RBT_proposal_for_submission_to_Senate_Finance_April_2015.pdf). A potential reform spurred by FATCA and FBAR is discussed *infra* Section IV.B.2.

18. This Article describes this informal construction of citizenship as “performative citizenship.” As will be discussed *infra* Part II, performative citizenship may be formalized into legal requirements.

wealth redistribution, tax law should proceed cautiously when the policy at issue is a concept as foundational as who can be a citizen. To the extent we are concerned with the depth of the tax-immigration nexus, some solutions may lie outside tax law. For example, immigration law and policy theorists could reconsider whether tax crimes should constitute removable offenses. Scholars focused on the emergence of “Crimmigration law” may further investigate the relevance of the tax-immigration nexus to that discussion.<sup>19</sup> But examining the tax-immigration nexus through the case study of LPRs yields important lessons for mainstream tax as well. A comprehensive understanding of the tax-immigration nexus could contribute to the emerging work on human rights and taxation.<sup>20</sup> Specifically, this Article argues that the tax treatment of LPRs yields multiple insights for tax law and policy: doing so undermines benefit theory arguments against citizenship-based taxation, creates opportunities for strengthening compliance across populations, may support fiscal citizenship, and suggests that fairness in tax policy compels different treatment of tax citizens than exists under the current regime.

The stakes are high. The Department of Homeland Security Office of Immigration Statistics most recent estimates provide that there are 13.1 million LPRs living in the United States.<sup>21</sup> A population that is regularly in flux as eligible LPRs naturalize and new individuals gain LPR status, the overall number of LPRs is slow to change. Approximately two thirds of the 2013 LPR population was eligible to naturalize with the remaining third not yet eligible.<sup>22</sup> Of the portion of LPRs eligible to naturalize, a majority will do so, but a significant number desire to complete the naturalization process but struggle with language or cost barriers.<sup>23</sup> It is this population—LPRs who have yet to naturalize—who most forcefully blur the line between citizen and noncitizen, while also facing insecurity not shared by the formal citizens with whom they share the same potential tax burden.

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19. A brief introduction to crimmigration law is provided *infra* Part I.

20. In September 2016, New York University School of Law hosted a conference entitled “Human Rights and Tax in an Unequal World.” More information on the conference and paper abstracts may be found at [http://chrgi.org/wp-content/uploads/2016/09/Human-Rights-Tax-in-an-Unequal-World\\_Conference-Program-1.pdf](http://chrgi.org/wp-content/uploads/2016/09/Human-Rights-Tax-in-an-Unequal-World_Conference-Program-1.pdf).

21. BRYAN BAKER & NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., ESTIMATES OF THE LAWFUL PERMANENT RESIDENT POPULATION IN THE UNITED STATES: JANUARY 2013, at 3 (2014), [http://www.dhs.gov/sites/default/files/publications/ois\\_lpr\\_pe\\_2013\\_0.pdf](http://www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2013_0.pdf).

22. *Id.* To be eligible for naturalization, an individual must satisfy a number of requirements including: be legally present in country for the statutorily required period, be of good moral character, and pass naturalization tests. For a comprehensive, non-technical discussion of the requirements see generally U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., A GUIDE TO NATURALIZATION 17 (2016), <https://www.uscis.gov/sites/default/files/files/article/M-476.pdf>.

23. ANA GONZALEZ-BARRERA ET AL., PEW RESEARCH CTR., THE PATH NOT TAKEN: TWO-THIRDS OF LEGAL MEXICAN IMMIGRANTS ARE NOT U.S. CITIZENS 7 (2013), [http://www.pewhispanic.org/files/2013/02/Naturalizations\\_Jan\\_2013\\_FINAL.pdf](http://www.pewhispanic.org/files/2013/02/Naturalizations_Jan_2013_FINAL.pdf).



Part I details the scope of the Article and discusses the recent expansion of the tax-immigration nexus brought by the Supreme Court's opinion in *Kawashima*. Part II lays the groundwork for conceptualizing the tax-immigration nexus by examining citizenship in social theory. Part III defines the boundaries of the tax-immigration nexus, applying social theory to identify tax law's direct and indirect roles in defining citizenship, as well as immigration law's contributions to the nexus. Part IV argues that recognizing the existence and the depth of the tax-immigration nexus requires reconsidering taxation of LPRs. Part IV then addresses the relevance of the tax-immigration nexus to the citizenship-based taxation debate, highlighting the ways in which both LPRs and nonresident U.S. citizens blur the boundaries of citizenship. The Part then concludes by evaluating potential reforms that respect the importance of the tax-immigration nexus while remedying its inequities, as well as identifying areas for further study.

#### I. COLLATERAL CONSEQUENCES: TAXATION, CITIZENSHIP, AND IMMIGRATION LAW

The relationship between taxation and citizenship is no stranger to scholarly inquiry. This Article departs from the trend, however, of debating the fairness of citizenship-based taxation—the system used by the United States that asserts the right to tax citizens on their worldwide income—as applied to nonresident U.S. citizens.<sup>24</sup> Instead, using the Supreme Court's 2012 decision in *Kawashima* as a frame, this Article turns its focus back stateside to another population: LPRs. LPRs are, as will be examined in further detail, classified as resident aliens, making them what this Article terms *tax citizens*. As a group, the tax treatment of LPRs has yet to be thoroughly addressed. The Article fills that gap in the literature.

Reconsidering the fundamental fairness of the current tax regime's treatment of LPRs is particularly timely. Immigration reform is on the forefront of national political discussions, and the actions of the next Presidential administration may significantly impact the lives of the approximately 40–45 million immigrants living in the United States.<sup>25</sup> The

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24. For further discussion, see *infra* Part IV. For scholarship on this topic, see sources cited *supra* note 13.

25. The rhetoric of this election season alone places immigration at the forefront of debate, a fact that many LPRs have noted. Ed O'Keefe, *Citizenship Applications Soar in Trump's Wake*, WASH. POST (May 27, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/05/27/citizenship-applications-soar-in-trumps-wake/>. In celebration of Hispanic Heritage Month, President Obama gave a speech to the Congressional Hispanic Caucus, alluding to the possibility of a regressive subsequent administration. Barack Obama, U.S. President, Address at 39th Annual Congressional Hispanic Caucus Institute Public Policy Conference and Annual Awards Gala (Sept. 15, 2016) (“[B]ut if we’re truly going to fix this system, we’re going to have to push back against bluster, falsehoods, and promises of higher walls.”). The relevant part of President Obama’s speech begins at 7:51. See Felicia Escobar, *Celebrating Hispanic Heritage Month: “Immigrants Are the American Character,”* WHITE HOUSE BLOG (Sept. 16, 2016, 4:47 PM), <https://www.whitehouse.gov/blog/2016/09/16/immigrants-are-american-character>. Estimates of the

taxation of unauthorized immigrants presents a distinct though overlapping set of concerns, as does the taxation of individuals present in the United States on nonimmigrant visas. Indeed, both groups could be the subjects of separate articles.<sup>26</sup> What makes LPRs a good population of focus is that they share both formal and substantive similarities with born or naturalized U.S. citizens.<sup>27</sup> Because LPRs possess green cards, a prerequisite to naturalization for most immigrants, they are already further along the path to citizenship than many other immigrants. Further, as this Article argues, LPRs are *performing* citizenship though they lack the protections of formal status as citizens.<sup>28</sup>

Though current law taxes LPRs the same as U.S. citizens, the consequences of noncompliance with the tax laws results in markedly disparate outcomes depending upon on which side of the citizen line an individual stands.<sup>29</sup> Herein lies a core concern of this Article: though Congress may have valid reasons for wanting to tax LPRs and U.S. citizens the same—reasons that will be explored later—the two groups are, in fact, distinct in meaningful ways that undermine the validity of that desire. Stated simply, an LPR’s noncompliance with tax law may close the door to naturalization or result in removal of that individual from the United States, whereas the same noncompliance by a citizen results in, at best, monetary penalties and, at worst, jail time. The fact that it is immigration law that leads to these outsized punishments<sup>30</sup> for the same crimes does not negate the relevance of those potential outcomes to tax

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immigrant population are available from multiple entities. The estimates used here come from the following sources: PEW RESEARCH CTR., MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065, at 7 (2015), <http://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/>; Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Apr. 14, 2016), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>. As this Article goes to print, the impact of now President Trump’s actions on the desire to immigrate or naturalize cannot be determined, though his orders and rhetoric suggest immigrants face even greater uncertainty.

26. For an excellent tax policy discussion of the taxation of unauthorized immigrants, see Lipman, *supra* note 13. The topic has also been in the popular media. See, e.g., Alexia Fernández Campbell, *The Truth About Undocumented Immigrants and Taxes*, ATLANTIC (Sept. 12, 2016), <http://www.theatlantic.com/business/archive/2016/09/undocumented-immigrants-and-taxes/499604/> (discussing how the Social Security system has come to rely upon the funds contributed by undocumented immigrants which they will not claim).

27. Much of the analysis of the fairness (or lack thereof) of the tax treatment of lawful permanent residents may hold for the other class of what I describe as “tax citizens”—individuals taxed as citizens by operation of § 7701 of the Internal Revenue Code but who do not have a green card (e.g., unauthorized immigrants or individuals present in the United States with authorization but who are not exempt from resident alien status). See I.R.S. § 7701 (2012).

28. Of course, other immigrants may be performing citizenship in ways substantially similar to U.S. citizens and LPRs. The rationale for focusing on LPRs at this juncture is that they combine formal and performative citizenship in ways that are particularly relevant for a comparison with nonresident U.S. citizens. Future work may focus, however, on the taxation of other resident noncitizens.

29. See *infra* note 34 and accompanying text; see also *infra* Part III.

30. For a full discussion of the collateral immigration consequences of tax offenses, see *infra* Section III.A.

policy. Though tax noncompliance has had immigration consequences for decades, the Supreme Court case of *Kawashima* has made evident the fundamental insecurity of LPRs and has set the stage for re-evaluating whether the current law fairly taxes LPRs in light of the significance of the tax-immigration nexus.

*Kawashima* is not a tax case in the sense that it does not concern matters of tax doctrine. Its relevance for tax law and policy is, nevertheless, significant. To immigration scholars, it is a story of administrative law and proper deference in the immigration context or the failure of the Court to respect the rule of lenity in immigration cases.<sup>31</sup> To criminal law scholars, it raises questions of prosecutorial discretion or what constitutes competent counsel when advising a client of the consequences of accepting a plea bargain.<sup>32</sup> To others, it may be one more case evincing the march of crimmigration law—a term coined to describe the convergence of immigration and criminal law<sup>33</sup>—by further expanding the number of offenses with grave immigration consequences.<sup>34</sup> To tax scholars, it should be understood as an opportunity—an opportunity to acknowledge

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31. For scholarship discussing *Kawashima* and immigration law, see Kevin R. Johnson & Serena Faye Salinas, *Judicial Remands of Immigration Cases: Lessons in Administrative Discretion from INS v. Cardoza-Fonseca*, 44 ARIZ. ST. L.J. 1041 (2012); Shruti Rana, *Chevron Without the Courts?: The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313 (2012); Matthew F. Soares, Note, *Agencies and Aliens: A Modified Approach to Chevron Deference in Immigration Cases*, 99 CORNELL L. REV. 925, 926, 941–42 (2014). The rule of lenity counsels that when an ambiguity exists in an immigration law it should be construed in the immigrant's favor. For an early case invoking the rule of lenity in immigration law, see *Bonetti v. Rogers*, 356 U.S. 691, 699 (1958) (drawing upon the rule of lenity developed in criminal law statutory interpretation in stating “[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts . . . against the imposition of a harsher punishment.” (quoting *Bell v. United States*, 349 U.S. 81, 83 (1955))).

32. For recent criminal law scholarship discussing *Kawashima* and these concepts, see generally Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1 (2012); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715 (2013); Hon. John H. Wilson, *Are There Still Collateral Consequences in New York After Padilla?*, 29 Touro L. REV. 545 (2013).

33. For an introduction to the concept of crimmigration law, see generally the oft-cited Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367 (2006).

34. Miller, *supra* note 33, at 620–35 (discussing the expansion of offenses giving rise to removal); *id.* at 622 (“Although immigration law could, and often did, impose hardships on excludable and deportable aliens, the regime of the 1960s, 1970s and early 1980s was arguably less punitive than it is today. The U.S. economy was robust, rates of migration to the United States were far lower and public attitudes toward immigrants were far more welcoming. Immigration law of this period has been characterized as liberal in its willingness to prioritize the natural rights of immigrants; humanitarian; family-oriented; service-oriented; even procedurally exuberant. Indeed, the contrasts are stark, yet to characterize this era as a due process ‘revolution’ overstates the fact. Immigrants, particularly refugees and asylum seekers, enjoyed perhaps the fullest privileges than ever before (or after). Even illegal immigrants were broadly tolerated on a level that was unprecedented in the modern era. The grounds for deportation of criminal and illegal aliens were narrower, the use of detention was less frequent, avenues for relief from detention were much broader, judicial review of deportation orders was broader, and far fewer immigration violations were criminally punishable.”).

the connections of tax with other areas of law and to use the lessons learned from examining those connections to strengthen tax law and policy.

*Kawashima* is, on its face, a statutory interpretation case where the statute under consideration comes from immigration law.<sup>35</sup> The petitioners in the case, Akio and Fusako Kawashima, were LPRs in the United States but citizens of Japan.<sup>36</sup> Thirteen years after becoming LPRs, the Kawashimas pleaded guilty to making and subscribing a false tax return and aiding and assisting in the preparation of a false tax return, tax crimes per § 7206(1) & (2).<sup>37</sup> It was not the substance of their tax crimes but the collateral immigration consequences of those crimes that took the Kawashimas' case to the Supreme Court. After serving their time for their violations of § 7206, the Kawashimas found themselves facing removal as aliens convicted of an aggravated felony under § 1227 of the Immigration and Nationality Act.<sup>38</sup> The connection to tax, and the statute the Court interpreted, was the definition of aggravated felony under

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35. See *Kawashima v. Holder*, 565 U.S. 478, 486–89 (2012) (resolving a circuit split on the issue of whether tax crimes other than § 7201 were aggravated felonies under the INA). In holding that clause (i) incorporates other tax crimes, the Court overruled the Third Circuit's holding in *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004), in which that court found the statute ambiguous and found the rule of lenity to apply. *Id.* at 488–89.

36. *Id.* at 480.

37. *Id.*; I.R.C. § 7206 (2012) (providing the provision is punishable by monetary penalties and/or imprisonment of up to three years). The statute reads as follows:

Any person who—(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or (2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or (3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or (4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or (5) Compromises and closing agreements.—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully.—(A) Concealment of property.—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or (B) Withholding, falsifying, and destroying records.—Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax; shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

I.R.C. § 7206.

38. *Kawashima*, 565 U.S. at 481.

§ 1101(a)(43)(M) of the INA.<sup>39</sup> Though the concept of an aggravated felony came into law in 1988,<sup>40</sup> it was not until 1994 that tax crimes specifically entered the fray, as § 7201 tax evasion became a specifically enumerated aggravated felony.<sup>41</sup> After the majority handed down its opinion, not only § 7201 tax evasion, but any tax crime involving fraud or deceit and a loss to the government of more than \$10,000 would qualify as an aggravated felony.<sup>42</sup> The *tax-immigration nexus*—the connections between tax and immigration law identified in the Article—existed before *Kawashima*. However, *Kawashima* left that nexus stronger than before the Court considered it and § 1101(a)(43)(M).

The outcome of *Kawashima* raises the question of the proper relationship between tax law and immigration. One could assume that the answer to that question is one of immigration law and policy. Indeed, that is the approach Justice Ginsburg takes in her dissent. Recognizing the essential question underlying the outcome of *Kawashima*, Justice Ginsburg poses the question: “One might also ask what reason Congress would have for making a tax misdemeanor a deportable offense, while more serious crimes do not jeopardize an alien’s residency in the United States.”<sup>43</sup> As an example, Justice Ginsburg notes that “driving while drunk causing serious bodily injury” was found not to be an aggravated felony.<sup>44</sup> Justice Ginsburg doubts the wisdom of the majority opinion not

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39. *Id.*; 8 U.S.C. § 1101(a)(43)(M) (2012) (identifying the following as an aggravated felony: “an offense that—(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000”).

40. Miller, *supra* note 33, at 633 (providing at its outset, the category was much more limited, including only “murder, drug trafficking and firearms trafficking crimes”). Miller notes, however, that “[t]he scope of crimes defined as aggravated felonies has continued to grow in waves of subsequent legislation.” *Id.* *Kawashima* may then be understood as part of the expansion described in Miller’s article. 565 U.S. at 487–89 (suggesting that tax crimes fall under the definition of aggravated felony).

41. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4322 (codified as amended at 8 U.S.C. § 1101(a)(43)(M) (2012)) (“(M) an offense that—(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$200,000; or (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds \$200,000.”); OFFICE OF IMMIGRATION LITIG., U.S. DEP’T OF JUSTICE, IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: *PADILLA V. KENTUCKY* 23 (2010), [https://www.justice.gov/sites/default/files/civil/legacy/2011/05/03/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide\\_11-8-10.pdf](https://www.justice.gov/sites/default/files/civil/legacy/2011/05/03/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf).

42. 8 U.S.C. § 1101(a)(43)(M). *See generally Kawashima*, 565 U.S. 478.

43. *Kawashima*, 565 U.S. at 497 n.2. An example of one such tax misdemeanor taken from my own home state of South Carolina provides, in pertinent part:

(3) A person required under any provision of law administered by the department and who wilfully fails to pay any estimated tax or tax, or who is required by any provision of law or by any regulation and who wilfully fails to make a return, keep records, or supply information, at the time or times required by law or regulation, in addition to other penalties provided by law, is guilty of a misdemeanor and, upon conviction, must be fined not more than ten thousand dollars, or imprisoned not more than one year, or both, together with the cost of prosecution.

S.C. CODE ANN. § 12-54-44(A)(3) (2016). A court could plausibly, post-*Kawashima*, find the requisite fraud and deceit present in commission of the misdemeanor to satisfy § 1101(a)(43)(M).

44. *Kawashima*, 565 U.S. at 497 n.2.

only because of its take on statutory interpretation but also because of its strengthening of the tax-immigration nexus by expanding the range of tax crimes that constitute aggravated felonies. As the *Kawashima* decision strengthens the tax-immigration nexus, it gives rise to significant proportionality concerns.<sup>45</sup> With a strengthened nexus comes even greater proportionality concerns because, as the scope of tax crimes that lead to removal broadens, the chance an LPR will face harsher consequences than a formal citizen for the same conduct increases.

Justice Thomas addresses the tax-immigration nexus indirectly. Writing for the majority, he implies the distinction between drunk driving and the range of tax crimes that may lead to removal: the presence or absence of fraud and deceit.<sup>46</sup> Certainly one can cause a crash that results in serious injury or death without engaging in any willfully fraudulent or deceitful conduct. To commit tax evasion without engaging in fraud or deceit would, however, be an impressive feat.<sup>47</sup> Stated differently, to the majority, the relevance of tax crimes is not that they violate *tax* law but simply that a tax crime is a violation of law, an act that casts the individual as unworthy of citizenship, a “bad citizen.”

The concerns of proportionality and morality that give rise to the majority and dissenting opinions ultimately center upon a core concern: Who is worthy of citizenship? Of permanent, full membership in the American community? These questions alone support exploring the tax-

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45. Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416 (2012) (providing that proportionality is the idea that “the severity of a sanction should not be excessive in relation to the gravity of an offense”). There is a healthy immigration law literature on proportionality and its relevance to immigration law and policy. As a point of entry into this discussion, see generally Wishnie, *supra*, and Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1732–40 (2009).

46. *Kawashima*, 565 U.S. at 482–87 (writing for the majority in a 6–3 opinion, Justice Thomas addresses the fraud and/or deceit inherent in certain tax crimes as he rejects the petitioners’ arguments that Congress, writing in the disjunctive, intended to exclude tax crimes from clause (i) of 8 U.S.C. § 1101(a)(43)(M)).

47. *Id.* at 484–85 (holding that clause (ii) intended to clarify that § 7201 tax evasion was an aggravated felony in the event that crime was committed without involving fraud or deceit). Earlier in his opinion, Justice Thomas states that the absence of fraud or deceit as elements of § 7206 does not defeat the respondent’s position that § 1101(a)(43)(M)(i) applies to the petitioners because, he states without extensive reasoning: “The elements of willfully making and subscribing a false corporate tax return . . . establish that those crimes are deportable offenses because they necessarily entail deceit.” *Id.* at 484–85. It is hard to imagine satisfying the elements of § 7206 without engaging in fraudulent or deceitful conduct but then, so to, is it hard to imagine satisfying the elements of § 7201 without engaging in the same. See *id.* at 493–95 (Ginsburg, J., dissenting). Justice Ginsburg questions the majority’s reasoning on this point, stating:

The Court acknowledges that evasion-of-payment cases almost always “involve some affirmative acts of fraud or deceit.” Still, there may be a rare case in which that is not so. Rare, indeed: imaginary would be an apt characterization. The Government conceded that, to its knowledge, there have been no actual instances of indictments for tax evasion unaccompanied by any act of fraud or deceit.

*Id.* at 495 (citations omitted). That Justice Thomas easily finds fraud or deceit to be satisfied by the elements of § 7206 but raises the specter of their absence in § 7201 as the motivating factor for Congress to create a largely redundant clause (ii) undercuts the logic of his opinion. “In other words, in holding that Clause (i) includes tax offenses, the Court finds Clause (ii) largely, but not totally, redundant.” *Id.* at 494.

immigration law nexus. After all, “[t]axes formalize our obligations to each other. . . . [S]ignify[ing] who is a member of our political community, [and] how wide we draw the circle of ‘we.’”<sup>48</sup> Investigating the tax-immigration nexus and immigration law’s reliance upon tax offenses in defining a citizen could be the substance of an entire article (if not a book). But *Kawashima*, and the substantive immigration law provisions it interprets, is not the only point of connection between tax and immigration. Tax law itself draws upon the concept of citizenship and immigration law as it works to define the taxable community. This Article argues, however, the existing literature on citizenship in tax suffers two shortfalls: first, it relies too heavily upon a formal, legalistic definition of citizenship, and second, it fails to appreciate the full extent of points of overlap between tax and immigration law that constitute the tax-immigration nexus. This Article seeks to address these shortfalls and contribute to the tax literature by exploring the implications of the tax-immigration nexus for substantive tax law and policy, the fiscal sociology<sup>49</sup> literature by describing tax law’s active role in constructing citizenship,<sup>50</sup> as well as the immigration and crimmigration policy literature. Doing so requires (1) expanding our notion of citizenship in tax beyond the formal status determined by immigration law, an expansion that social theory on citizenship allows, and (2) acknowledging<sup>51</sup> and defining the tax-immigration nexus. The next two Parts address each of these points in turn.

## II. BEYOND LEGAL STATUS: THEORIZING CITIZENSHIP

Line drawing is a critically important aspect of tax law. Sorting ordinary assets from capital assets impacts, among other things, the rate applied to gain from that asset.<sup>52</sup> Debt receives markedly different treat-

48. Isaac William Martin et al., *The Thunder of History: The Origins and Development of the New Fiscal Sociology*, in *THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE* 1, 1 (Isaac William Martin et al. eds., 2009).

49. *Id.* at 2 (describing how fiscal sociology embraces the idea that tax should be studied in an interdisciplinary fashion: “We chose the name *fiscal sociology* . . . to suggest a science that would transcend increasingly narrow disciplines and unite the study of economics with the study of history, politics, and society”).

50. *Id.* at 2–4. Exploring the active role tax law plays in constructing citizenship situates this Article squarely within the goals of what the editors term the “new fiscal sociology.” *Id.* at 3 (“What is new about the new fiscal sociology is its recognition that taxation has a theoretical or causal—and not just a symptomatic or methodological—importance.”).

51. Stumpf, *supra* note 33, at 377 (describing how crimmigration law scholars note that immigration and criminal scholars have similarly failed to acknowledge the overlap of their respective areas of law). Stumpf writes:

Yet little has been written about why this merger has occurred, and what are its theoretical underpinnings. Scholars of criminal and immigration law have tended to stay on their own sides of the fence, focusing on developments within their fields rather than examining the growing intersections between these two areas.

*Id.*

52. See Nohel B. Cunningham & Deborah H. Schenk, *The Case for a Capital Gains Preference*, 48 TAX L. REV. 319, 322–24 (1993) (providing an excellent discussion of the definition and tax treatment of capital gains). The concept of capital gains holds that certain types of income (such

ment than equity—a fact that creates frustration for tax students and opportunity for practitioners.<sup>53</sup> A complex system of rules and standards pervades tax law to assist in the line-drawing project.<sup>54</sup> Drawing the line between those inside and outside the taxable community is part of that project, and tax law uses citizenship to tackle it. Superficially, tax relies upon a simple rule to identify citizens: any person defined as a U.S. citizen under the Constitution or by immigration law is a U.S. citizen for tax purposes. But to say tax uses only a formal concept of citizenship would be error. Examining tax law and scholarship through the lens of social theory, specifically anthropological and sociological theory, reveals that tax relies upon both the legalistic, formal concept of citizenship as legal status and its own more standard-like concept of citizenship as a status an individual achieves through performance.

Accepting that tax law relies upon a non-legalistic view of citizenship requires unpacking the very concept of citizenship. Citizenship is, in some ways, a deceptively complex concept. At first blush it may seem to be limited to a legal status that creates a clear division between citizens and noncitizens. Yet citizenship is more than a formal legal status.<sup>55</sup> A brief survey of social theory understandings of citizenship illustrates the complexity of citizenship as a concept and provides a point of departure for developing a nuanced concept of citizenship in tax.

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as gains from investment property or activities) should be taxed at lower rates. The rationale behind a preferential rate is the subject of a healthy body of scholarship. The statutory definition of capital assets that gives rise to capital gains is found at I.R.C. § 1221 (2012) and the rate schedule in I.R.C. § 1(h) (2012).

53. See STEPHEN SCHWARZ & DANIEL J. LATHROPE, *FUNDAMENTALS OF CORPORATE TAXATION* 122–25 (8th ed. 2012) (providing an introduction to the topic debt and equity with an eye toward its importance for tax law). Subchapter C of the Internal Code provides the law governing taxation of corporations but does little to distinguish debt and equity. See generally Shu-Yi Oei & Diane Ring, *Human Equity? Regulating the New Income Share Agreements*, 68 VAND. L. REV. 681 (2015) (providing a recent discussion of the challenges of sorting debt from equity in the realm of income share agreement).

54. For example, consider I.R.C. § 302 (2012), a corporate tax provision that determines whether a sale of shareholder stock back to a corporation for property or cash or a partial liquidation that results in a distribution to shareholder should be taxed as an exchange or a dividend. To distinguish between redemptions and dividends the section uses a mix of safe harbor rules and standards. See *id.*

55. See Irene Bloemraad et al., *Citizenship and Immigration: Multiculturalism, Assimilation, and Challenges to the Nation-State*, 34 ANN. REV. SOC., Aug. 2008, at 153, 155 (providing citizenship may be analyzed simply as status but an extensive and diverse literature recognizes that legal status does not fully explain citizenship); *id.* (“Citizenship debates today continue to reflect tensions between citizenship as participation, political or otherwise, and citizenship as legal status, with or without accompanying rights and obligations.”); see also Rhoda E. Howard-Hassmann, *Introduction to THE HUMAN RIGHT TO CITIZENSHIP: A SLIPPERY CONCEPT*, *supra* note 2, at 1–2 (stating that on the one hand “citizenship is a legal status through which the individual can access rights and goods in the state of her nationality or nationalities,” but also, that “citizenship [is not] a simple binary entity that one either possesses or does not; citizenship can be partial, soft, obscured by political realities, or nonexistent”).



Sociologists define citizenship generally as a concept that groups individuals into geographical and political communities.<sup>56</sup> That sociological concept of citizenship is then further deconstructed into potentially but not necessarily overlapping parts<sup>57</sup>: “[1] legal status, [2] rights, [3] political and other forms of participation in society, and [4] a sense of belonging.”<sup>58</sup> Full citizenship, then, is the presence or exercise of each of these four aspects. Certain disciplines may, however, elevate one form of citizenship over others. Law, for example, may elevate legal status and access to rights over participation or belonging. An individual may have formal legal status but lack a sense of belonging, thereby existing in a type of “second-class citizenship.”<sup>59</sup> Alternately, a sense of belonging and acceptance by one’s community may provide a basis for achieving formal legal status as a citizen.<sup>60</sup>

Anthropologists take a slightly different approach, instead focusing on the ways in which law shapes and reflects culture. Influential legal anthropologist Sally Falk Moore, herself both a trained attorney and anthropologist, identified three general approaches anthropology<sup>61</sup> takes in its study of law that inform the discussion of citizenship and the law:

56. See generally Bloemraad et al., *supra* note 55; Howard-Hassmann, *supra* note 55, at 2 (“[C]itizenship in its sociological sense [is] that set of practices (juridical, political, economic and cultural) which define a person as a competent member of society. . . .” (internal quotation marks omitted)).

57. Bloemraad et al., *supra* note 55, at 154, 157 (“Citizenship is usually defined as a form of membership in a political and geographic community. It can be disaggregated into four dimensions: legal status, rights, political and other forms of participation in society, and a sense of belonging. The concept of citizenship allows us to analyze the extent to which immigrants and their descendants are incorporated into receiving societies.”). These oft-cited dimensions derive from T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950).

58. Bloemraad et al., *supra* note 55, at 154 (providing an excellent review of trends in sociological study of citizenship and potential avenues for future research).

59. *Id.* at 162; see also Howard-Hassmann, *supra* note 55, at 17–18 (“So citizenship is slippery, even though, legally speaking, you are a citizen or you are not. . . . Citizenship rights can vary by ‘race,’ ethnicity, gender, sexual orientation, stage of life, or social status. . . . And it is much easier to slide down the slippery slope of citizenship rights than to climb back up again.”). For a discussion on the influence of belonging on citizenship, see Faist, *supra* note 2, at 196 (“A third component of citizenship is affiliation. It concerns the buttressing of the political and legal dimensions through expressive and moral components articulated, for example, through feelings of belonging to a collectivity such as a nation. . . . This third dimension highlights the fact that citizenship is not solely based on relations between states and citizens, that relations among citizens are decisive for guaranteeing equal political liberties, rights and obligations.”). See generally Martha T. McCluskey, *Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP* 267, 267–85 (Linda C. McClain & Joanna L. Grossman eds., 2009) (discussing gender and dependency as a less-than citizenship).

60. See Bloemraad et al., *supra* note 55, at 162 (“Conversely, participation in the labor market or business sector, payment of taxes, participation in local schools, raising families, or other activities that make people an integral part of their local communities and institutions can be understood as a form of participatory citizenship that allows immigrants to make citizenship-like claims on the state and others, even in the absence of legal citizenship status, and perhaps even in the absence of legal residence.” (citation omitted)).

61. Though Anthropology is, at its core, a descriptive discipline, it has a complicated political and social history arising from the normative judgments of its scholars (whether implicit or explicit) and the roles it has played as both challenger and supporter of colonial and post-colonial regimes. Its work on citizenship as a concept can, however, provide helpful insights.

“law as culture,” “law as domination,” and “law as problem solver.”<sup>62</sup> When we narrow our view from law broadly to legal definitions of citizenship specifically, each of these three anthropological understandings of law holds a potential insight.

Law or citizenship as culture suggests that each definition of citizenship within law reflects and supports a broader cultural understanding of belonging. When one views law as culture, the laws of citizenship may be understood as social phenomenon or a “social dynamic” not unlike race or gender.<sup>63</sup> Whether a definition of citizenship comes from immigration or tax law, it provides insight into the culturally contingent categories of us/them as it structures those categories, either by reifying or challenging them. Anthropology that advances the law as culture view may see legal definitions of citizenship as mirrors of the culture that gave rise to those definitions or as part of a common cultural structure that reproduces itself across disciplines and realms within that cultural context. Regardless of if one takes the interpretivist<sup>64</sup> or structural-functionalist view,<sup>65</sup> the core idea—that law is both a product of and plays a constitutive role in its cultural context—is consistent.

Citizenship as domination suggests the laws of citizenship may participate in a disciplining or exploitative project of those with less power by those with more.<sup>66</sup> Certainly, immigration laws may be used to deliberately shape individual behavior or exclude groups from membership within a given community because of discriminatory views or as part of

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62. Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999*, 7 J. ROYAL ANTHROPOLOGICAL INST. 95, 96–97 (2001); see also ROSEN, *supra* note 1, at 6–7 (writing in his brief but rich introduction to legal anthropology on the tendency of lawyers to understand the law as something apart from culture: “When we hear a court speak of ‘the conscience of the community,’ ‘the reasonable man,’ or ‘the clear meaning of the statute,’ when we watch judges grapple with parenthood as a natural or functional phenomenon, or listen to counsel debate whether surrogate motherhood or a frozen embryo should be thought of in terms of ‘ownership,’ we know that the meaning of these concepts will come not just from the experience of legal officials or some inner propulsion of the law but from those broader assumptions, reinforced across numerous domains, that characterize the culture of which law is a part”). The “we” in this statement seems to be anthropologists but may also include legal scholars. Certainly there is disagreement within the legal academy, much less the tax academy, as to the extent to which law is culturally-contingent.

63. See Andrew Kipnis, *Anthropology and the Theorisation of Citizenship*, 5 ASIA PAC. J. ANTHROPOLOGY 257, 258 (2004).

64. Geertz was a highly influential anthropologist writing in this area. For an example of such work, see CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 1, 6–13 (1973) (discussing his view of the goal of anthropology and famously discussing the possible ways of analyzing a wink).

65. For key works in the structural-functionalist literature, see generally V.W. TURNER, *SCHISM AND CONTINUITY IN AN AFRICAN SOCIETY: A STUDY OF NDEMBU VILLAGE LIFE* (1957); Claude Lévi-Strauss, *Structural Analysis in Linguistics and Anthropology*, in *STRUCTURAL ANTHROPOLOGY* 31 (Clair Jacobson & Brooke Grundfest Schoepf trans., Basic Books 1963) (1945).

66. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (seeing power as part of a structure greater than individuals themselves, Foucault would, to a degree, deny agency to even those ostensibly in positions of power); Assaf Likhovski, “*Training in Citizenship*”: *Tax Compliance and Modernity*, 32 LAW & SOC. INQUIRY 665 (2007) (suggesting that a possible link between tax compliance and the construction of modern nation states and citizenry can be found in the Foucauldian-type disciplining of the individual through mechanisms of compliance).

exploitative aims. Take, for example, the process of shifting toward using a heavily-racialized concept of “illegality” to exclude targeted groups of immigrants from arriving or staying in the United States.<sup>67</sup> However, this Article takes the view that the concepts of citizenship found in tax are not shaped by any intentional animus. However, the disciplining role of law is relevant in the citizenship realm to the extent that legal requirements for obtaining citizenship, by their very nature, direct an individual’s behavior if she desires naturalized citizenship status. Laws defining citizenship in immigration and tax thus play a role in disciplining individual behavior in the citizenship as domination view.

Law as problem solver derives from the ethnographic work on dispute resolution that was a focus of early legal anthropology. The law as problem solver view holds that “law is a problem-solving, conflict-minimizing device, consciously arrived at through rational thought . . . .”<sup>68</sup> Stated differently, law takes the place of violent conflict as a tool for resolving disputes. Where citizenship intersects with tax, the greatest potential conflict is over competing sovereigns who both desire to tax a given individual. Citizenship, in this conflict, represents a potentially relevant legal category for resolving that conflict based upon recognized principles such as justice, administrability, fairness, or sovereignty. Indeed, attempting to resolve double taxation that could result from two sovereigns that both assert the right to tax an individual’s income is a core challenge of international tax law and its system of treaties.<sup>69</sup> The law as problem solver view advances what is a commonly-

67. NICHOLAS DE GENOVA, WORKING THE BOUNDARIES: RACE, SPACE AND “ILLEGALITY” IN MEXICAN CHICAGO 228–29 (2005) (“The treatment of ‘illegality’ as an undifferentiated, transhistorical thing-in-itself colludes with state power in creating a remarkable visibility of ‘illegal immigrants’ swirling enigmatically around the stunning invisibility of the law.”); *see also* Miller, *supra* note 33, at 652–53 (noting a shift within immigration law terminology fits within the anthropological view that law can be deployed to exclude). Miller notes that deportable (removable) aliens were, up until the 1970s, known instead as “convicted aliens.” Miller, *supra* note 33, at 652. The more common, contemporary term is now “criminal” or “illegal” aliens. As Miller notes, the term “criminal alien” is arguably “more pejorative” than “convicted alien” which “emphasizes the past nature of the criminal conviction.” *Id.*

68. Moore, *supra* note 62, at 97.

69. MICHAEL J. GRAETZ, FOLLOW THE MONEY 11 (2016) (“[T]he fundamental dilemma of international taxation that confronted Thomas Sewall Adams, his Treasury colleagues, and the Congress in the infancy of the income tax remains essentially unchanged. When income is earned in one country by a citizen or resident of another country, both the country where the income is earned (the source country) and the country where the investor or earner resides (the residence country) have legitimate claims to tax the income. The basic task of international tax rules is to resolve the competing claims . . . in order to avoid the double taxation that results when both fully exercise their taxing power.”); *see also* Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1305–06 (1996) (discussing the origins of our current system and noting “[i]n 1923, a committee of four economists submitted a report to the League of Nations that set out the basic principles underlying international tax jurisdiction for the first time. The report pointed out that an income tax based on ability to pay does not answer the question of whose ability to pay is to be considered in each taxing jurisdiction. To answer this question, the report developed the ‘doctrine of economic allegiance,’ which underlies modern discussions of jurisdiction to tax. Fundamentally, the report endorsed two bases for economic allegiance, which justify a country’s imposition of tax: where income is produced (the source jurisdiction) and where it is consumed or saved (the residence jurisdiction).”); *id.* at 1311–12 (discussing the preference for

held understanding of the law generally and citizenship in tax specifically.<sup>70</sup> Though it is an important view, the focus of this Article is on expanding our understanding of citizenship in tax beyond the traditional view.<sup>71</sup> As such, law as culture and law as domination or discipline are more important to that project.

Law as culture and law as domination/discipline ground the substance of citizenship outside formal legal status. That laws regarding citizenship reflect and create the boundaries of citizenship, suggests that the legal status of citizen is a label of a set of behaviors or socially ascribed characteristics. Social theory suggests that those behaviors or characteristics that create citizenship arise from the foundational idea that citizenship represents a bargain between the government and its people.<sup>72</sup> The relationship between the State and its citizens is one of mutual obligation.<sup>73</sup> This two-way street of rights and responsibilities

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residence as applied to individuals rather than businesses). See generally AVI-YONAH ET AL., *supra* note 9, at 1, 18, 31; Allison Christians, *Measuring a Fair Share*, BIG PICTURE (Oct. 1, 2012), <http://taxprof.typepad.com/files/68ti0095.pdf>; Christians, *supra* note 13.

70. See *infra* Part III; see also Moore, *supra* note 62, at 97 (“This rationalist framework is widely used in the legal profession . . .”).

71. Again, this effort situates this Article squarely within the fiscal sociology project. Fiscal sociology projects utilize a similarly interdisciplinary approach to situate tax in its historical, cultural, and social contexts in different countries. For an introduction to this literature, see generally Martin et al., *supra* note 48, at 1.

72. See Charles Tilly, *Foreword* to THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE, *supra* note 48, at xi (discussing the influence of Locke’s theory of social contract). John Locke addressed the social contract and, specifically, the need for an authority to tax in his *Second Treatise of Civil Government*:

Tis true governments cannot be supported without great charge, and it is fit every one who enjoys a share of the protection should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent, i.e., the consent of the majority giving it either by themselves or their representatives chosen by them. For if any one shall claim a power to lay and levy taxes on the people, by his own authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government. For what property have I in that which another may by right take when he pleases to himself?

*Id.* (quoting JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 140 (1690)). For a discussion going beyond Locke, see NIAL FERGUSON, THE CASH NEXUS 79 (2001) (“Ever since the time of ancient Athens, the link between taxation and political representation has been the crux of democracy . . .”); AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION 1877–1929, at 13 (2013) (describing the historical origins of progressive taxation and noting that “[t]ax reform, simply put, was used to reconfigure the relationship between citizens and the state. It was used to renegotiate the ‘imagined community’ of the modern American polity.”).

73. Compare Bloemraad et al., *supra* note 55, at 156 (“A more expanded understanding of legal citizenship focuses on the rights that accompany citizenship. This perspective, dominant in much theorizing on citizenship, resonates with liberalism’s understanding of the relationship between individuals and the state as a contract in which both sides have rights and obligations. To maintain the citizenship contract, the state guarantees basic rights to individuals, while the individual has the obligation to pay taxes, complete compulsory education, and obey the laws of the country. The rights approach holds out the promise of full equality before the law for all members of a state but leaves unresolved how to transform formal into substantive equality.” (citations omitted)), with Audrey Macklin, *Sticky Citizenship*, in THE HUMAN RIGHT TO CITIZENSHIP: A SLIPPERY CONCEPT, *supra* note 2, at 223 (discussing the recent problem of “sticky citizenship” in the modern era and noting that “[f]ew legal duties specifically attach to citizenship in the many states that have abolished conscription. The benefits of citizenship seem easily to outweigh its burdens . . .”). Though

creates the potential for distinguishing between good and bad actors. A State may default on its agreement to provide goods and services, just as a citizen may not hold up her end of the bargain.<sup>74</sup> Empirical work supports the theoretical work that views citizenship as more than legal status.<sup>75</sup> The action or inaction that distinguishes good citizens from bad is the most important aspect for this Article, because it makes evident that there is a distinction between *formal citizenship*—defined here as having legal status as a citizen of a country—and *performative citizenship*—defined here as meeting socially and culturally required expectations of citizenship and belonging.<sup>76</sup>

Distinguishing between formal and performative citizenship allows us to recognize more nuance in the concept of citizenship and, in turn, the different concepts at play in doctrine. For example, an individual may have formal citizenship but may not engage in “active citizenship.” Taken from literature on development policy, “active citizenship” requires formal status as well as *participation* in government and/or community.<sup>77</sup> Scholars distinguish between formal citizenship and “meaningful citizenship”<sup>78</sup> or “substantive citizenship” to draw attention to individuals who may have formal status but are effectively—either deliberately or through structural violence<sup>79</sup>—denied the full rights of citizenship. Each of these concepts emphasizes different aspects of what we mean when we say citizenship but distill into a single idea: confining citizenship to a formal, legal status ignores much of its substance.

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Macklin makes the statement in the context of addressing why we might be concerned with sticky citizenship—citizenship that remains with a person after not being desired—the statement, if correct, weakens the assertion that citizenship is truly a mix of roughly equal burdens and benefits. See LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 8 (1998) (discussing the fiction of the assumption of burden in exchange for the benefits of citizenship); *id.* (“It is rather a wonderfully dynamic fiction. Except for naturalized citizens, there is no particular moment when most individuals can be said to assume obligations to the state. Instead we take consent as implied by our failure to refuse (to pay taxes, for example . . .) and by continued acceptance of services the state provides.”).

74. See generally MARGARET LEVI, OF RULE AND REVENUE (1989); McCluskey, *supra* note 59, at 267–85.

75. See RECONSIDERING THE DEMOCRATIC REPUBLIC 159–63 (George E. Marcus & Russell L. Hanson eds., 1993) (discussing how individuals may not agree on what duties citizenship compels or how one distinguishes between a good citizen and a bad citizen but the general division, and the extra-legal concept of citizenship that it implies, is observable).

76. Different areas of scholarship embrace the term performative citizenship. I do not intend to draw upon all the different uses of the term found therein, but instead limit the term to the definition provided above. See, e.g., Kathryn R. Abrams, *Performative Citizenship in the Civil Rights and Immigrant Rights Movements* (Univ. Cal. Berkeley Pub. Law Research Paper No. 2409971, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2409971](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409971) (for a different use). See generally DARREN J. O’BYRNE, THE DIMENSIONS OF GLOBAL CITIZENSHIP: POLITICAL IDENTITY BEYOND THE NATION-STATE 191–201 (2003).

77. Matthew Clarke & Bruce Missingham, *Guest Editors’ Introduction: Active Citizenship and Social Accountability*, 19 DEV. PRAC. 955, 955 (2009).

78. McCluskey, *supra* note 59, at 270, 276–77.

79. See generally PAUL FARMER, PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR (2005), for an extended discussion of structural violence and its impact on healthcare and human rights; Paul Farmer, *An Anthropology of Structural Violence*, 45 CURRENT ANTHROPOLOGY 305 (2004).

The proposition that citizenship has a performative aspect may, to many, seem uncontroversial. The simple fact that an individual may become a naturalized citizen in the United States<sup>80</sup>—that she may acquire citizenship outside of the common avenues of *jus sanguinis* (by blood) or *jus soli* (by birthright) citizenship<sup>81</sup>—implies that citizenship can be earned. Stated differently, the mere option of naturalized citizenship assumes that one can “behave like” a citizen. But tax is an area that, however necessary standards may be, frequently expresses a preference for rules, predictability, and clear distinctions over subjective analyses of intent or, in the context of citizenship, belonging. Formally, if briefly, examining the broader social theory concept of citizenship opens the door to recognizing that tax, despite its preference for clear lines, utilizes both a formal and performative understanding of citizenship.

Lending further support to the concept of performative citizenship is the fact that it surfaces outside social theory. Op-eds read that “[d]emocratic citizens owe it to each other to vote.”<sup>82</sup> Discussions on immigration reform speak of *earning* citizenship.<sup>83</sup> In his 2013 commencement speech at Ohio State University, President Barack Obama drew upon a sense of performative citizenship, saying:

Consider that graduates of this university serve their country through the Peace Corps, and educate our children through established programs like Teach for America, startups like Blue Engine, often earning little pay for making the biggest impact. Some of you have already launched startup companies of your own. And I suspect that those of you who pursue more education, or climb the corporate ladder, or enter the arts or science or journalism, you will still choose a cause that you care about in your life and will fight like heck to realize your vision.

*There is a word for this. It's citizenship.*<sup>84</sup>

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80. Compare RUTH MANDEL, *COSMOPOLITAN ANXIETIES: TURKISH CHALLENGES TO CITIZENSHIP AND BELONGING IN GERMANY* (2008) (discussing ethnographic exploration *jus sanguinis* principles in historical German citizenship law), with Howard-Hassmann, *supra* note 55, at 6 (“Citizenship is further complicated by the legal statuses of *jus soli*, or right of the soil, that is, citizenship by virtue of having been born in a particular place, as opposed to *jus sanguinis*, or the right of the blood, citizenship by virtue of bloodline or inheritance of a parent’s citizenship status.”). See also *Dual Citizenship in Germany: Jus Sanguinis Revisited*, *ECONOMIST* (Mar. 2, 2013), <http://www.economist.com/news/europe/21572822-how-not-treat-people-more-one-passport-jus-sanguinis-revisited>.

81. See Bloemraad et al., *supra* note 55, at 156; see also Howard-Hassmann, *supra* note 55, at 6 (noting that the United States grants citizenship on the basis of *jus soli* principles).

82. Lisa Hill, *What We’ve Seen in Australia with Mandatory Voting*, *N.Y. TIMES* (Nov. 7, 2011), <http://www.nytimes.com/roomfordebate/2011/11/07/should-voting-in-the-us-be-mandatory-14/what-weve-seen-in-australia-with-mandatory-voting>.

83. See, e.g., David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, *N.Y. TIMES* (Dec. 18, 2010), [http://www.nytimes.com/2010/12/19/us/politics/19immig.html?\\_r=0](http://www.nytimes.com/2010/12/19/us/politics/19immig.html?_r=0).

84. Barack Obama, U.S. President, Spring Commencement Speech at The Ohio State University (May 5, 2013) (transcript), <https://www.osu.edu/index.php?q=features/2013/obamacommencement.html>.

Here President Obama appeals to the idea that citizenship is something you do, not just a status you possess. And these are simply a few of many examples of such rhetoric on the performative aspect of citizenship.

A nation constructs its citizenry through a number of means, of which law is one.<sup>85</sup> This relatively brief discussion of citizenship and social theory yields two important insights for the purposes of this Article. First, citizenship is not only a formal legal status but also a social practice that individuals perform to varying degrees. These formal and performative concepts of citizenship exist within tax and immigration law as avenues for accomplishing different goals. Second, law both reflects and constitutes the culture in which it is imbedded. Both insights from social theory lay the groundwork for arguing that tax law has a direct and indirect role in defining citizenship. The definition of tax residence, which, in turn, identifies tax citizens is one example. When citizenship is understood as more than a formal legal status, laws that do not define citizenship on their face can be seen in a new light. Such laws, as they rely upon behaviors that constitute performative citizenship to allocate the taxpaying burden of citizenship, can be seen as part of a broader social project of constructing citizenship.

### III. DEFINING THE TAX-IMMIGRATION NEXUS

Both tax law and immigration law create the tax-immigration nexus. Armed with a more nuanced concept of citizenship, we are poised to recognize the contributions of both areas of law to what I term the *tax-immigration nexus*—the network of connections between immigration and tax law. Where immigration law relies upon tax offenses to determine whether an individual is removable or eligible for citizenship, it creates multiple points of connection between the separate areas of law. Similarly, when tax uses immigration and citizenship categories to assess taxability and tax liability, it contributes to the tax-immigration nexus.<sup>86</sup> This Part defines and describes the tax-immigration nexus, therein providing the groundwork for analyzing the implications of that nexus for tax law and policy in Part IV.

#### A. *Citizenship in Immigration Law*

Citizenship, immigration, and naturalization laws define who is and can be a formal member of a national community. Unsurprisingly, these laws have changed over time and reflect the shifting attitudes of voting

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85. DE GENOVA, *supra* note 67, at 227 (noting “law’s productivity”); Stumpf, *supra* note 33, at 398 (“Immigration law defines membership . . . by establishing a ladder of accession to permanent resident and then formal U.S. citizenship, and a set of criteria to determine whether an individual meets the requirements . . .”).

86. As this Article focuses on the implications of tax-immigration nexus for tax law and policy, I chose tax-immigration nexus rather than the equally valid immigration-tax nexus.

citizens and the government.<sup>87</sup> Immigrants seeking U.S. citizenship must meet the requirements set forth in the Immigration and Nationality Act that range from filing necessary forms to establishing good moral character.<sup>88</sup> A comprehensive discussion of the requirements for entry to the U.S., acquisition of LPR status, and naturalization is beyond the scope of this Article. Instead, this Article focuses on the connections between tax and these requirements. Where immigration law draws on tax, it is doing so with one apparent goal: to determine if an individual is the type of citizen “we” collectively desire. Essentially, immigration law uses tax compliance or noncompliance as a proxy for determining whether an individual would be a good citizen or, in the terms of social theory, whether an individual is performing her citizenship. The role, then, of tax offenses in constructing citizens is one where tax offenses are foot soldiers in the immigration law task of regulating immigration and citizenship. Examining the scope of tax crimes that may result in removal flesh-es out the behaviors that we expect of citizens and the seriousness with which we view transgressions.

Recall that the focus of this Article is on the tax-immigration nexus and its impact on LPRs. Accordingly, considering each of the potential points of intersection of immigration and tax law within the life of a given LPR provides a helpful framework for understanding the nexus. Imagine Ishita, a lawful permanent resident living in South Carolina. Ishita has been living in South Carolina for five years, the required statutory period for her naturalization.<sup>89</sup> Ishita desires to become a naturalized U.S. citizen and begins the process of applying for citizenship.

Assuming Ishita has complied with all tax laws, Ishita may only become aware of the tax-immigration nexus upon beginning her naturaliza-

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87. MIGRATION POLICY INST., MAJOR U.S. IMMIGRATION LAWS, 1790–PRESENT (2013), <http://www.migrationpolicy.org/research/timeline-1790>. Examining even this relatively straightforward timeline illustrates the impact of historical and cultural context on immigration laws. Citizenship was, for example, granted only to “free white persons” or revoked from women who married foreign nationals. See KERBER, *supra* note 73, at 81–92 (discussing the story of two sisters arguing for women’s right to vote as a “privilege of citizenship,” arguing, in part, that their status as taxpayers justified their right to full citizenship). See generally KEVIN JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 459–507 (2009); Peter F. Asaad, *A Selected History of Immigration Law and Its Relationship to Modern Immigration Law and Policy*, in WHAT EVERY LAWYER NEEDS TO KNOW ABOUT IMMIGRATION LAW 17–32 (Jennifer A. Hermansky & Kate Kalmykov eds., 2014).

88. 8 U.S.C. § 1427 (2012) (detailing the requirements for naturalization).

89. *Id.* § 1427(a) (“Residence[—]No person, except as otherwise provided in this subchapter, shall be naturalized unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time, and who has resided within the State or within the district of the Service in the United States in which the applicant filed the application for at least three months, (2) has resided continuously within the United States from the date of the application up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.”).



tion application. If she has received assistance on her path to citizenship, however, she may understand how important tax compliance is to citizenship.<sup>90</sup> The means by which immigration authorities obtain her compliance information is routine and well known in tax: a simple, though lengthy, form. Though seemingly mundane, naturalization forms provide ready evidence of the tax-immigration nexus. An LPR seeking naturalization must complete the U.S. Citizenship and Immigration Services (USCIS), a part of the Department of Homeland Security, Form N-400. Among a host of other questions spanning topics from marital history to voting activity, Part 12 of the form (Additional Information) asks applicants three tax-related questions.<sup>91</sup>

Excerpt from Form N-400:

6.	Do you owe any overdue Federal, State, or local taxes?	<input type="checkbox"/> Yes <input type="checkbox"/> No
7.	A. Have you ever not filed a Federal, State, or local tax return since you became a Permanent Resident?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	B. If "Yes," did you consider yourself to be a "non-U.S. resident"?	<input type="checkbox"/> Yes <input type="checkbox"/> No
8.	Have you called yourself a "non-U.S. resident" on a Federal, State, or local tax return since you became a Permanent Resident?	<input type="checkbox"/> Yes <input type="checkbox"/> No

The questions center upon compliance, both payment and filing, and proper characterization of the applicant as either a nonresident—a tax category—or permanent resident—an immigration category. Agency factsheets further emphasize the importance of tax compliance on the path to naturalization.<sup>92</sup> Though only a part of the assessment of eligibility for citizenship,<sup>93</sup> the presence of the questions in Part 12 and the emphasis seen in unofficial explanatory materials, evince the importance of tax compliance in sorting “good” would-be citizens from “bad.” Tax is special. By including questions regarding tax compliance, the USCIS is attempting to establish whether we, as a society, would want Ishita as a fellow citizen. If Ishita is compliant with the tax laws, these three ques-

90. Practice area guides give varying levels of information on the connection between tax and immigration. See Vlad Frants & Brandon D. Hadley, *Tax Rules for Immigration Law Practitioners*, in *WHAT EVERY LAWYER NEEDS TO KNOW ABOUT IMMIGRATION LAW*, *supra* note 87, at 495–507. This text is published by the ABA Section of Administrative Law and Regulatory Practice. Chapter 18 of this same text specifically lists tax compliance as a relevant consideration to the good moral character assessment aspiring citizens face. Jennifer A. Hermansky, *U.S. Citizenship and Naturalization*, in *WHAT EVERY LAWYER NEEDS TO KNOW ABOUT IMMIGRATION LAW*, *supra* note 87, at 361.

91. U.S. Citizenship & Immigration Servs., U.S. Dep’t of Homeland Sec., Form N-400: Application for Naturalization (Dec. 23, 2016), <http://www.uscis.gov/sites/default/files/files/form/n-400.pdf>.

92. U.S. Citizenship & Immigration Servs., U.S. Dep’t of Homeland Sec., Thinking About Applying for Naturalization?: Use This List to Help You Get Ready! (Nov. 2016), <http://www.uscis.gov/sites/default/files/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20Site/Publications/PDFs/G-1151.pdf> (“Have you reported your income on your income tax forms? Your tax returns are very important proof that you are eligible for naturalization. On the day of your interview, bring certified tax returns for the last 5 years (3 years if you are married to a U.S. citizen). Certified tax transcripts may be ordered by using Internal Revenue Service (IRS) Form 4506-T available at [www.irs.gov](http://www.irs.gov) or calling 1-800-829-1040.”).

93. See 8 U.S.C. §§ 1151–1381 (2012) (listing offenses that may bar admission or naturalization or result in deportation).

tions will provide no bar to her naturalization—she has checked one box on the good citizen checklist. If she is not, however, she may experience the full-force of the tax-immigration nexus through any of three immigration concepts: aggravated felony, crime of moral turpitude, or the concept of good moral character.

### 1. Grounds for Removal: Tax Crimes as Aggravated Felonies and Crimes of Moral Turpitude

Considering the most damning use of tax offenses in immigration first takes us to § 1104(a)(43)(M), the INA section defines an “aggravated felony.” Clause (ii) of subparagraph M identifies a specific offense as an aggravated felony—§ 7201 tax evasion<sup>94</sup> where the government loses more than \$10,000—while clause (i) describes a class of crimes: crimes “involv[ing] fraud or deceit in which the loss to the victim or victims exceeds \$10,000.”<sup>95</sup> Thus, only one of the two clauses is, by its terms, tax specific. Paragraph 43 then continues its voluminous list of potential aggravated felonies without another mention of tax crimes. As introduced in Part I, *Kawashima* broadened the range of tax crimes that can count as aggravated felonies under the INA, thus deepening this point of connection in the tax-immigration nexus. Committing an aggravated felony *at any point after admission* renders an LPR removable, meaning the consequences of being found guilty of these offenses is profound.<sup>96</sup> Looking to the substance of the offenses that qualify gives a better sense of the scope of this part of the tax-immigration nexus and the conduct that immigration law believes makes for a “bad” citizen.

Section 7201 defines the “capstone” offense of tax evasion as follows:

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94. Section 7201 is discussed further *infra* Part III. The statutory language defines the crime and potential penalties:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

I.R.C. § 7201 (2012).

95. 8 U.S.C. § 1101(a)(43)(M) (2012). Interestingly, the required financial loss was greater before a 1996 change in law. In that year, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 lowered the (a)(43) amounts from \$200,000 to \$10,000. Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-628 (codified as amended at 8 U.S.C. § 1101(a)(43)(M) (2012)); see also *Kawashima v. Holder*, 565 U.S. 478, 497 (2012) (Ginsburg, J., dissenting) (noting that an LPR could quickly reach the required threshold: “Nor would the \$10,000 threshold set in 8 U.S.C. § 1101(a)(43)(M) prevent deportation for tax crimes far less serious than willful tax evasion, for as many as six years may be included in the amount-of-loss calculation”).

96. 8 U.S.C. § 1227(a) (2012) (listing classes of “deportable aliens”). The consequences of an aggravated felony differ depending upon the immigration status of an individual. The Supreme Court notes that deportation (or removal) has consistently been recognized as a “particularly severe ‘penalty.’” *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (addressing whether an individual was entitled to post-conviction relief for ineffective assistance of counsel because his attorney failed to inform him of the collateral immigration consequences of his guilty plea in an unrelated crime).

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.<sup>97</sup>

In subsequent sections, Congress articulated lesser-included offenses such as the failure to file a return or pay tax.<sup>98</sup> The relationship of these lesser-included offenses to tax evasion is a matter of scholarly and prosecutorial interest but is not particularly relevant here.<sup>99</sup> Most important for this Article is the key takeaway that these offenses target willful, fraudulent attempts to evade assessment of payment of tax liability.<sup>100</sup>

Taking *Kawashima* alongside the INA makes clear that tax compliance is a significant aspect of performing and being eligible for citizenship. So significant, in fact, that committing a tax crime justifies both closing the door to citizenship and uprooting an individual from the community to which she may have belonged for decades. This outcome, though severe, may be appropriate. Perhaps flagging “bad” tax citizens as “bad” citizens by use of aggravated felonies is right as a matter of immigration policy.<sup>101</sup> Many may wish the same fate on U.S. citizens who regularly flout the income tax laws.<sup>102</sup> But does the same logic remain true as the offense becomes less grave or, as in the case of civil penalties, may be due to inadvertent noncompliance?

Aggravated felonies are not the only crimes that result in removal. INA § 1227(a)(2) states that an LPR who commits a crime of moral tur-

97. I.R.C. § 7201.

98. See I.R.C. § 7203 (2012) (“Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 60501, the first sentence of this section shall be applied by substituting ‘felony’ for ‘misdemeanor’ and ‘5 years’ for ‘1 year.’”).

99. See generally OFFICE OF CHIEF COUNSEL, CRIMINAL TAX DIV., TAX CRIMES HANDBOOK (2009), [https://www.irs.gov/pub/irs-utl/tax\\_crimes\\_handbook.pdf](https://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf).

100. See I.R.C. § 7201.

101. To be clear, I am not arguing in favor of this view. Instead, I am simply acknowledging that tax policy is not the only driver in this discussion. Immigration law policymakers must assess the degree to which they believe tax compliance is a reliable proxy for “good” citizenship. As the next subpart discusses, however, the decisions that immigration policymakers have made have import for tax law and policy and, as this Article argues, are particularly problematic when the noncompliance is inadvertent.

102. This statement was made by many colleagues as this paper was in development, though perhaps with tongue in cheek.

pitute within five or ten years of admission that may result in a sentence of a year or more, is deportable.<sup>103</sup> So too is an LPR with multiple convictions of crimes of moral turpitude regardless of whether the crime can or does result in imprisonment.<sup>104</sup> Courts have defined the bounds of crimes of moral turpitude and have regularly considered state and federal tax offenses as such.<sup>105</sup> A recent Ninth Circuit opinion succinctly summarizes the doctrine: “Crimes of moral turpitude are of basically two types, those involving fraud and those involving grave acts of baseness or depravity.”<sup>106</sup> Tax offenses fall into the former category. In the same case, *Carty v. Ashcroft*, the Ninth Circuit considered whether, under a California statute, failure to file a return with a willful intent to evade tax was synonymous with intent to defraud, thereby rendering the offense a crime of moral turpitude.<sup>107</sup> Finding the two to be synonymous, the LPR taxpayer remained removable.<sup>108</sup> A key insight illustrated by this and other similar opinions, is that an offense need not include fraud as a specific element for the offense to constitute a crime of moral turpitude.<sup>109</sup> Employing an analysis similar to that of the majority opinion in *Kawashima*, courts have found that if fraud is a necessary though unstated element of the tax offense, such an offense may be a crime of moral turpitude.<sup>110</sup>

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103. The time limit depends upon the individual’s particular path to LPR status. For example, see 8 U.S.C. § 1430(a) (2012), which governs residents who are married to U.S. citizens. The statute reads:

Any person whose spouse is a citizen of the United States, or any person who obtained status as a lawful permanent resident by reason of his or her status as a spouse or child of a United States citizen who battered him or her or subjected him or her to extreme cruelty, may be naturalized upon compliance with all the requirements of this subchapter except the provisions of paragraph (1) of section 1427(a) of this title if such person immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least three years, and during the three years immediately preceding the date of filing his application has been living in marital union with the citizen spouse (except in the case of a person who has been battered or subjected to extreme cruelty by a United States citizen spouse or parent), who has been a United States citizen during all of such period, and has been physically present in the United States for periods totaling at least half of that time and has resided within the State or the district of the Service in the United States in which the applicant filed his application for at least three months.

*Id.*

104. I.R.C. § 1227(a)(2)(A)(ii) (2012).

105. As the Fourth Circuit succinctly stated: “Generally, violations of the federal tax law constitute crimes of moral turpitude, which, in turn, demonstrate a lack of good moral character.” *El-Ali v. Carroll*, No. 95-1013, 1996 WL 192169, at \*4 (4th Cir. Apr. 22, 1996) (per curiam).

106. *Carty v. Ashcroft*, 395 F.3d 1081, 1083 (9th Cir. 2005).

107. *Id.* at 1082.

108. *Id.* at 1085 (“Having determined that willful failure to file a tax return, with the intent to evade taxes, involves fraud, and thus constitutes a crime of moral turpitude, we dismiss the petition for lack of jurisdiction.”).

109. *Id.* at 1084 (“We have held that [e]ven if intent to defraud is not explicit in the statutory definition, a crime nevertheless may involve moral turpitude if such intent is implicit in the nature of the crime.” (internal quotation marks omitted)).

110. See *Kawashima v. Holder*, 565 U.S. 478 (2012); see also *Chhabra v. Holder*, 444 F. App’x 493 (2d Cir. 2011) (holding that willful tax evasion met the crime of moral turpitude standard because willful evasion requires intent to defraud); *Costello v. Immigration & Naturalization Serv.*,

This broad understanding of crimes of moral turpitude can encompass a number of tax offenses. But a broad sweep may be appropriate when considered alongside the limitations on the impact of commission of crimes of moral turpitude. An LPR will only be removable for committing crimes of moral turpitude within a particular limited time frame after admission, or if she or he commits multiple offenses. The law, thus, seems designed to catch individuals before they are fully entrenched in their lives in the United States or, even if they have been performing citizenship, if they show themselves to be repeat offenders. This stands in contrast to even one commission of an aggravated felony being sufficiently severe to establish bad character. When, however, a crime is considered a lesser crime of moral turpitude, we need to see a pattern of bad actions before we pass judgment on the individual's character.

Lawful permanent residents who commit an intentional or willful, fraudulent tax offense may not be the most sympathetic group. If tax compliance is a significant aspect of performative citizenship—as the tax-immigration nexus suggests it is—an offending LPR's failure to perform this aspect of citizenship may outweigh the other social, civic, and economic connections that comprise that citizenship. Paired with the LPR's lack of formal citizenship, she finds herself facing a simple equation "bad tax citizen"="bad citizen." But the equation does not necessarily balance as easily when the offenses are civil and the character assessment by immigration authorities is discretionary. In that case, the weight of the performative citizenship of an individual and the disproportionately lenient punishment of formal citizens for the same offense looms large.

## 2. Grounds for Removal: Taxation and "Good Moral Character"

Commission of an aggravated felony or crime of moral turpitude provides a statutory ground for removal, but the tax-immigration nexus goes beyond tax crimes. To be eligible for naturalization, an immigrant must be of "good moral character."<sup>111</sup> The fact that no statutory ground

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311 F.2d 343 (2d Cir. 1962) ("There can be no 'wilful' evasion without a specific intent to defraud."), *rev'd*, 376 U.S. 120 (1964).

111. Good moral character is one of multiple requirements. 8 U.S.C. § 1427(a) (2012) reads:

(a) Residence[—]No person, except as otherwise provided in this subchapter, shall be naturalized unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time, and who has resided within the State or within the district of the Service in the United States in which the applicant filed the application for at least three months, (2) has resided continuously within the United States from the date of the application up to the time of admission to citizenship, and (3) *during all the periods referred to in this subsection has been and still is a person of good moral character*, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

*Id.* (emphasis added).

for removal exists does not establish that the individual is of good moral character.<sup>112</sup> Rather, the individual immigrant bears the burden of establishing good moral character for at least the five years preceding the naturalization application, though conduct outside that period may be relevant as well.<sup>113</sup>

Returning to § 1101 of the INA yields a list of behaviors or actions that establish statutory poor moral character.<sup>114</sup> None of the listed offensive behaviors are tax-related, though there is a cross reference to the now familiar definition of aggravated felony which, by its definition, includes tax crimes.<sup>115</sup> If the § 1101(f) list of behaviors that establish poor moral character were exhaustive, subsection (f) would add little to the tax-immigration nexus. Flush language in subsection (f) creates a “catch-all” category of behavior, however, stating that “[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that *for other reasons* such person is or was not of good moral character.”<sup>116</sup> This language opens the door to an even more robust tax-immigration nexus; a door regularly utilized by immigration authorities to cast a range of tax offenses as evidence that an individual lacks the requisite good moral character to become a naturalized citizen.

USCIS can use findings or *allegations* of civil tax offenses—violations of law that fall outside the aggravated felony standard rule in

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112. *Id.* § 1427(d) (“No finding by the Attorney General that the applicant is not deportable shall be accepted as conclusive evidence of good moral character.”).

113. *Id.* § 1427(e) (“In determining whether the applicant has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the Attorney General shall not be limited to the applicant’s conduct during the five years preceding the filing of the application, but may take into consideration as a basis for such determination the applicant’s conduct and acts at any time prior to that period.”).

114. To be precise, these traits or behaviors show a lack of good moral character, the absence of which is assumed to be poor moral character. I intend to imply no judgment but rather simply the opposite of the required moral character for naturalization. *See* I.R.C. § 1101(f) (2012) (“For the purposes of this chapter—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—(1) a habitual drunkard . . . (3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section [8] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period; (4) one whose income is derived principally from illegal gambling activities; (5) one who has been convicted of two or more gambling offenses committed during such period; (6) one who has given false testimony for the purpose of obtaining any benefits under this chapter; (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period; (8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section); or (9) one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom).”).

115. *See id.* § 1101(f)(8) (“[O]ne who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section).”).

116. *Id.* § 1101(f) (emphasis added).

§ 1101(a)(43)—to establish lack of good moral character.<sup>117</sup> Case law in the area illustrates two key points: (1) immigration authorities regularly use and accept civil tax offenses as evidence of a lack of good moral character and (2) no finding of liability is required for the alleged offense to count against moral character. Such offenses, ranging from errors in assessing liability to failing to pay taxes owed,<sup>118</sup> fall under the catch-all category of behaviors showing poor moral character under § 1101(f).<sup>119</sup> Detailing a few illustrative examples gives a better sense of the relevance of tax compliance to the good moral character assessment.

The use of civil tax offenses, whether established or alleged,<sup>120</sup> to challenge an individual's good moral character is a widespread occurrence. Though courts look favorably on a record of payment of taxes,<sup>121</sup> the more frequent use appears to be to cast doubt on an individual's character.<sup>122</sup> Circuit courts have confirmed, for example, that failing to pay tax owed is an act that is within the immigration judge's discretion to

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117. 8 C.F.R. § 316.10(b)(1)–(3) (2012). Note the absence of a requirement of conviction or charge of unlawful acts, but rather simply that the individual committed acts showing a lack of good moral character. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., USCIS POLICY MANUAL, vol. 12, pt. F, ch. 5 (2016), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter5.html> (“This provision does not require the applicant to have been charged or convicted of the offense. An ‘unlawful act’ includes any act that is against the law, illegal or against moral or ethical standards of the community. The fact that an act is a crime makes any commission thereof an unlawful act.”).

118. *Okoloji v. Chertoff*, No. 3:07CV24(WWE), 2007 WL 1851216, at \*1 (D. Conn. June 25, 2007) (“Failure to pay owed taxes is an unlawful act that adversely reflects upon your moral character. In light of the lack of evidence concerning any extenuating circumstances that would have caused petitioner’s failure to pay taxes timely, the USCIS found that plaintiff had not sustained his burden of proof to establish good moral character during the statutorily prescribed period.”).

119. *See, e.g., Cardenas-Morfin v. Ashcroft*, 87 F. App’x 629, 631 (9th Cir. Jan. 20, 2004) (showing an example of USCIS introducing allegations of tax offenses to negate good moral character).

120. *Id.* (“At the hearing, the INS accused Cardenas of intentionally making false statements on old tax returns. Although these alleged misrepresentations occurred before the five year statutory period for assessing moral character required by 8 U.S.C. § 1229c(b)(1)(B), the IJ nevertheless concluded that Cardenas lacked good moral character.”). Though the Ninth Circuit ultimately remanded the case for further proceedings, it is illustrative of the tendency of the Immigration Judge to accept and immigration authorities to use alleged violations. *Id.* at 632.

121. *Angel v. Chertoff*, No. 07-cv-168-JPG, 2007 WL 3085962, at \*1 (S.D. Ill. Oct. 22, 2007) (“He pays his taxes and employs dozens of workers.”).

122. *See, e.g., Dominguez-Capistran v. Gonzales*, 413 F.3d 808, 809 (8th Cir. 2005) (discussing an example of a court favorably noting that a woman “diligently paid state and federal taxes in this country” when considering her cancellation of removal proceedings), *vacated*, 428 F.3d 876 (8th Cir. 2006); *see also Abuhekal v. U.S. Citizenship & Immigration Servs.*, No. 10–4687 ADM/TNL, 2011 WL 2600709, at \*5 (D. Minn. June 30, 2011); *Abulkhair v. Bush*, No. 08–CV–5410 (DMC)(MF), 2010 WL 2521760, at \*9 (D.N.J. June 14, 2010) (“The Court notes that failure to file tax returns or otherwise comport with civic responsibilities can in some instances prevent a naturalization applicant from demonstrating ‘good moral character.’”), *aff’d*, 413 F. App’x 502 (3d Cir. Feb. 9, 2011); *Gizzo v. Immigration & Naturalization Serv.*, No. 02 Civ. 4879(RCC), 2003 WL 22110278, at \*1 (S.D.N.Y. Sept. 10, 2003) (using a prior criminal incidence of noncompliance to argue a lack of good moral character; despite the incident being outside the statutory period “[t]he District Director stated that a failure to report income constitutes a crime involving moral turpitude”).

consider when evaluating good moral character.<sup>123</sup> Neither the amount of tax owed because of the error being significant nor a legal finding of intent to commit the tax offense are requirements for the offense to count as a strike against the good moral character of the individual.<sup>124</sup> Somewhat concerning is the inconsistency of opinions regarding just how much noncompliance is relevant—sometimes errors are sufficient, whereas in other instances they are not—an inconsistency that is due to the discretionary nature of the moral character assessment.<sup>125</sup> Importantly, the fact that an individual amends her return to correct any errors will not necessarily assist her in immigration proceedings.<sup>126</sup> Further, doubts as to the relevance of the act on the individual's moral character will be resolved *against* the applicant.<sup>127</sup> Taken together, case law on the use of

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123. See *Marji v. Gonzales*, 166 F. App'x 197, 200 (6th Cir. Feb. 8, 2006) (“[F]ailing to pay taxes can be grounds for an adverse character finding, [and] the IJ did not err in considering these facts.”).

124. *Sumbundu v. Holder*, 602 F.3d 47, 56 (2d Cir. 2010).

125. *Id.* (upholding a finding of lack of good moral character where the individuals had a history of underreporting where “whatever intent requirement may apply *could* be found”); *El-Ali v. Carroll*, No. 95-1013, 1996 WL 192169, at \*6 (4th Cir. Apr. 22, 1996) (per curiam) (holding where errors regarding the address on the return were accepted as evidence of a lack of good moral character); *Sekibo v. Chertoff*, No. H-08-2219, 2010 WL 2196271, at \*4 (S.D. Tex. May 26, 2010) (allowing for some dishonesty regarding compliance and stating “[w]hile it is likely that, for example, filing a late tax return one year and then neglecting to acknowledge that fact on a naturalization application would not, standing alone, prevent an applicant from showing good moral character, the Court finds that failing to file tax returns for five consecutive years and then denying that fact under penalty of perjury is not indicative of an applicant with ‘good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States’” (quoting 8 U.S.C. § 1427(a) (2012))); *Gambino v. Pomeroy*, 562 F. Supp. 974, 985 (D.N.J. 1982) (“The mere existence of errors in tax returns could not rationally be regarded as a basis for saying that a petitioner was not of good moral character. Failure to file, however, is quite another matter so long as there is any indication of an obligation to file. Continued failure to file is even worse.”). For a recent discussion of the good moral character assessment, see Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1574 (2012) (noting “[USCIS]’ current penchant for punitive discretion” and calling for reform).

126. *Sumbundu*, 602 F.3d at 56 (upholding a finding of lack of good moral character where the individuals had a history of underreporting where “whatever intent requirement may apply could be found”). The Second Circuit also determined that the sum of taxes owed was not determinative. *Id.* The petitioners in the case asserted that, to be a strike against their moral character, the amount owed needs to be “substantial.” *Id.* at 50. The court rejected this argument, stating: “We conclude that misrepresenting a ‘substantial sum’ may certainly be a factor in the IJ’s moral character determination. We nevertheless reject Petitioner’s suggestion that the agency’s discretion under the catchall provision is so narrow, as to entail any such requirement.” *Id.* at 56.

127. The discretion given to the courts derives from the fact that naturalized citizenship is something an individual earns, as opposed to a given right. See, e.g., *United States v. Spohrer*, 175 F. 440, 441–43 (C.C.D.N.J. 1910) (“An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred.”), cited with approval in *Johannessen v. United States*, 225 U.S. 227 (1912); see also V. Woerner, Annotation, *What Constitutes Showing of “Good Moral Character” on the Part of an Applicant for Naturalization*, 22 A.L.R.2d § 2 (2014) (“Consequently, the courts agree that naturalization is a matter of grace, not of right, a privilege to be granted only upon compliance with all the terms prescribed by the Congress; that the good moral character requirements continue up to and including the date of final hearing upon the petition for naturalization; that the petitioner has the burden of proving good moral character; and that all doubts as to his good moral character must be resolved against the petition-



tax compliance in the good moral character evaluation illustrates that noncompliance, or even merely alleged noncompliance with a broad range of tax offenses, is held to be a marker of bad character.<sup>128</sup>

For each sympathetic petitioner in the cases just cited there is one who may seem less so.<sup>129</sup> Though many may be unsympathetic to LPRs like the Kawashimas, being similarly unsympathetic to the LPRs who fall into the good moral character space of the tax-immigration nexus seems unnecessarily harsh. Our tax code is notoriously complex and there are a multitude of potential footfalls. Indeed, petitioners in many good moral character cases note the complexity of the Code and the difficulty of compliance.<sup>130</sup> Should an individual fail to comply, there is also a range of civil penalties at the IRS's disposal to support tax compliance by making noncompliance costly. The Code lays out accuracy and fraud penalties including, § 6651 for failure to file a return or pay tax, § 6662 which imposes, in part, penalties for underpayment of tax due to negligence or substantial understatements, and a fraud penalty under § 6663 when the Service can show that even part of an understatement is due to taxpayer fraud. Even with the help of tax preparation software, it is not unreasonable for individuals to make inadvertent mistakes that result in noncompliance.<sup>131</sup> Financial penalties may be appropriate in

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er.”). See generally *United States v. Macintosh*, 283 U.S. 605, 626 (1931), *overruled in part on other grounds by* *Girouard v. United States*, 328 U.S. 61 (1946).

128. The use of the good character requirement (and the aggravated felony and crime of moral turpitude concepts used to support it) is to identify “good” citizens. For an express statement of this idea, see *In re Nybo*, 34 F.2d 161, 163 (E.D. Mich. 1929) (“Granting of citizenship is a question which must be approached from the standpoint of the advantages to result to this country rather than the benefits which would flow to the petitioner.”), *aff’d*, 42 F.2d 727 (6th Cir. 1930); Woerner, *supra* note 127, § 2 (“It has been frequently stated, and without dissent, that the purpose of the naturalization statutes is to admit to citizenship those aliens who, having met other requirements, it appears will make good American citizens.”). Courts struggle with the standard by which to judge moral character but the consensus seems to be immigrants should be judged by the “average” citizen and morality of the time. For a discussion of the range of cases addressing the standard, see Woerner, *supra* note 127, § 3. Judge Learned Hand, speaking then for the Second Circuit, articulated the inherent challenges of such speculation in *Schmidt v. United States*, 177 F.2d 450, 451 (2d Cir. 1949) (“[W]e thought that such conduct did not conform to ‘the generally accepted moral conventions current at the time’; but we added: ‘Left at large as we are, without means of verifying our conclusion, and without authority to substitute our individual beliefs, the outcome must needs be tentative; and not much is gained by discussion.’”).

129. See, e.g., *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 706 (6th Cir. 2005) (“Santana-Albarran argues that the back tax returns are reliable because ‘no one is going to hang a large tax liability around his or her neck unless the tax is owed.’ Analogizing to the Federal Rules of Evidence, he states that filing the tax returns is a statement against interest and therefore is credible proof that he was in the country during those times. We find this argument to be wholly unpersuasive. One would certainly ‘hang a large tax liability around his or her neck’ if it means that one could avoid removal from the country, as was evidenced by the fact that these returns were filed in the first place only in response to the IJ’s concern.” (citations omitted)).

130. See, e.g., *Mateo v. Gonzales*, 217 F. App’x 476, 485 (6th Cir. Feb. 15, 2007).

131. For example, many business deductions require the taxpayer to maintain adequate records to substantiate the business use of an asset, such as a car that may have personal use value as well. When the Service attempts to establish fraudulent intent under the civil § 6663 fraud penalty it uses “badges of fraud” including failure to maintain adequate records. *Morse v. Comm’r*, 86 T.C.M. (CCH) 673 (2003). Failing to maintain adequate records may not, alone, be enough to establish fraud but can support a finding. *Id. But see Gambino*, 562 F. Supp. at 985 (“The mere existence of errors

such cases, but are all tax offenses sufficiently concerning, or is the evidence required to establish willfulness for civil tax offenses strong enough that they should be able to outweigh the myriad of ways in which the individual has performed her citizenship (which may include compliance with other tax laws)?<sup>132</sup> If the answer from immigration law is yes, tax law should respond by evaluating the impact of such grave collateral consequences on the fairness of its own laws.

Understanding the collateral consequences of tax law in immigration and the extent to which immigration law uses tax as an indication of whether an individual is performing her citizenship, give us a sense of the tax-immigration nexus from the standpoint of immigration law. At its core, the tax-immigration nexus created by immigration law illustrates that immigration law uses tax law to help define its view of community. Through the tax-immigration nexus, immigration law uses tax to police the boundaries of the U.S. community by granting or denying membership to individuals based, in part, on their tax compliance. By including questions regarding compliance on the naturalization form, immigration law uses the tax-immigration nexus to discipline and train “good citizens” as it requires compliance.<sup>133</sup> Thus, the substance of the tax-immigration nexus that immigration law provides fits well into the performative citizenship mold—citizenship is both a status you have and something *you do*. The next subpart fleshes out tax law’s contribution to the tax-immigration nexus.

### *B. Citizenship in Tax Law*

Tax law contributes to the tax-immigration nexus in two ways. First, by relying upon immigration categories to define the taxable community—the group from whom the government asserts the right to collect tax—tax law directly creates a point of connection in the nexus. Se-

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in tax returns could not rationally be regarded as a basis for saying that a petitioner was not of good moral character.”). There is, however, no statutory bar to considering errors as evidence of a lack of good moral character and, most importantly, tax authorities may use repeated errors to establish an intent to defraud the government, as discussed above.

132. *El-Ali v. Carroll*, No. 95-1013, 1996 WL 192169, at \*4 (4th Cir. Apr. 22, 1996) (Hall, J., concurring) (per curiam) (writing separately and questioning the sufficiency of evidence used to establish willfulness in stating: “From the moment of his confrontation with the interview examiner, El-Ali has steadfastly denied any wrongdoing. In truth, the only evidence of guilt that the INS has before it are El-Ali’s signed tax returns bearing his in-laws’ address; however, that El-Ali intentionally signed a tax return containing incorrect information does not mandate a conclusion that he specifically intended to deceive or defraud the government by doing so. Indeed, the circumstances in this case appear to indicate just the opposite. El-Ali came to this country, diligently found employment (which he yet retains), started a family, and strove to assist his new father-in-law by purchasing a grocery store for him to run. There is abundant evidence in the record from which the trier of fact could conclude that El-Ali simply made an innocent mistake, perhaps as a result of giving his father-in-law too free a rein, or by relying too much on the tax preparer. Moreover, it strains credulity to posit that El-Ali would willfully file a false tax return, then, unbidden, bring a copy of it to the immigration interview.” (internal quotation marks omitted)).

133. Similar overlap has been explored in the context of crimmigration law. For an excellent discussion of the importance of such overlap, see Miller, *supra* note 33, at 617.

cond, tax law indirectly deepens the tax-immigration nexus by codifying a concept of performative citizenship in its definition of resident alien and exclusions therefrom.

An individual need not have a formal immigration status to be a taxpayer. Stated differently, *tax citizen* and *formal citizen* need not overlap as categories. If we understand citizenship as both formal and performative, this lack of correlation leads to two different but potentially overlapping concepts of citizenship. An individual may have one formal immigration status as citizen or noncitizen and a separate performative citizenship status as a tax citizen. In the simplest case—a U.S. citizen living in the United States—citizenship as formal immigration status and tax citizen status overlap perfectly—this person is both a U.S. citizen per immigration law<sup>134</sup> and a “United States person” subject to tax as a citizen under § 7701(a)(3) of the Internal Revenue Code. Reality is, as ever, a bit more complex. An individual may be present in the United States as a noncitizen and still perform her citizenship so as to be classified as a tax citizen; owing tax on the same terms as a U.S. citizen.<sup>135</sup> LPRs best exemplify this lack of overlap by representing a unique mix of formal immigration status just shy of citizenship, paired with an extended history of performing citizenship in meaningful ways by living, working and participating in their local and national communities.<sup>136</sup> The fact that LPRs fall into the gap between formal and tax citizenship raises concerns for tax policy that become evident as one examines tax law’s contributions to the tax-immigration nexus.

### 1. Tax Law’s Direct and Indirect Connections to Immigration Law

Tax law’s direct contribution to the tax-immigration nexus is readily identifiable. Section 1 of the Internal Revenue Code imposes a tax on individuals, but it is § 7701 that clarifies who constitutes an individual

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134. 8 U.S.C. § 1401(a) (2012).

135. Indeed, LPRs perform their citizenship in more ways than simply owing taxes on the same terms as citizens. While LPRs cannot vote, they are required to register for the selective service alongside citizens and all other immigrants. For more information on selective service requirements, see *Immigrants and Dual Nationals*, SELECTIVE SERV. SYS., <https://www.sss.gov/Registration/Immigrants-and-Dual-Nationals> (last visited Jan. 11, 2017).

136. Certainly individuals whose immigration status is authorized but who do not have LPR status or unauthorized immigrants may participate in and contribute to their communities in meaningful ways that track performative citizenship. Indeed, there are numerous studies quantifying the contributions unauthorized immigrants make to federal, state, and local revenues. See Lipman, *supra* note 13, at 2; see also Campbell, *supra* note 26; Juila Preston, *Immigrants Aren’t Taking Americans’ Jobs, New Study Finds*, N.Y. TIMES (Sept. 21, 2016), [http://www.nytimes.com/2016/09/22/us/immigrants-arent-taking-americans-jobs-new-study-finds.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&\\_r=0](http://www.nytimes.com/2016/09/22/us/immigrants-arent-taking-americans-jobs-new-study-finds.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=0) (summarizing the economic and fiscal consequences of immigration). However, the fact that LPRs have already obtained a necessary pre-requisite to citizenship—the green card—means they are further along the path to formal citizenship and, therein, uniquely situated.

subject to tax.<sup>137</sup> Section 7701 starts by defining a “person” as a natural person or individual (as well as trusts, estates, and business entities).<sup>138</sup> Section 7701 also defines the term “taxpayer” as “any person subject to any internal revenue tax.”<sup>139</sup> Neither of these paragraphs truly gives a clear sense of the taxable community. In § 7701(a)(30) the Code begins to clarify the boundaries of that community as it defines “United States person” as a “citizen or resident of the United States . . . .”<sup>140</sup> Through subparagraph 30, the Code identifies citizens as falling within the bounds of the taxable community while it also adds another category—*resident*.<sup>141</sup>

The Code defines a resident, specifically a resident alien, in two ways. Section 7701(b) sets out these two definitions of resident status, as well as provides for an election into such status.<sup>142</sup> Clause (i) uses the immigration law definition of LPR to identify such persons as tax residents.<sup>143</sup> Clause (ii) sets out a substantial presence test<sup>144</sup> while clause (iii) provides an election for resident status.<sup>145</sup> A nonresident is, by extension, an individual who fails both the formal and substantial presence tests.<sup>146</sup>

Section 7701’s core contribution to the nexus begins with clauses (i) and (ii). Clause (i) creates tax law’s direct connection to immigration law. The connection is direct because it is tax law that forces the overlap between an immigration category and a tax result. To define resident alien, § 7701(b) uses the immigration category of LPR to identify a taxa-

137. For the purpose of this Article, I am focused on natural persons. Section 1 of the Code imposes a tax on individuals and prescribes different rate schedules for persons based upon their marital status and whether they care for qualifying dependents. I.R.C. § 1(a)–(d) (2012).

138. I.R.C. § 7701(a)(1) (2012).

139. *Id.* § 7701(a)(14).

140. *Id.* § 7701(a)(30).

141. The regulations clarify beyond any doubt that citizens, resident aliens, and nonresident aliens are all part of the taxable community. Treas. Reg. § 1.1-1(a)(1) (2008) (“Section 1 of the Code imposes an income tax on the income of every individual who is a citizen or resident of the United States and, to the extent provided by section 871(b) or 877(b), on the income of a nonresident alien individual.”).

142. I.R.C. § 7701(b)(1)(A) (“(b) Definition of resident alien and nonresident alien.—(1) In general.—For purposes of this title (other than subtitle B)—(A) Resident alien.—An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii).”).

143. *Id.* § 7701(b)(1)(A)(i) (“Lawfully admitted for permanent residence.—Such individual is a lawful permanent resident of the United States at any time during such calendar year.”); *see also* Treas. Reg. § 301.7701(b)-1 (2008) (“An alien is a resident alien with respect to a calendar year if the individual is a lawful permanent resident at any time during the calendar year. A lawful permanent resident is an individual who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws.”).

144. I.R.C. § 7701(b)(1)(A)(ii) (“Substantial presence test.—Such individual meets the substantial presence test of paragraph (3).”).

145. *Id.* § 7701(b)(1)(A)(iii) (“First year election.—Such individual makes the election provided in paragraph (4).”).

146. *Id.* § 7701(b)(1)(B) (“Nonresident alien.—An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).”). *See generally* I.R.C. § 871 (2012).

ble resident alien.<sup>147</sup> Stated simply, the fact that an individual has been vetted by and identified as a member of the national community by USCIS provides a proxy for membership in the taxable community. Thus, a resident alien becomes, by operation of § 7701(b) a *tax citizen*—someone understood to be sufficiently enmeshed in the community as to be taxable.

The substantial presence category gives shape to the tax citizen category. It does so by making evident the assumptions underlying tax law's use of the LPR status as a proxy for community membership. The second clause of § 7701(b)(1)(A) identifies individuals who satisfy the substantial presence test as resident aliens. In doing so, it provides the foundation of tax law's indirect contribution to the tax-immigration nexus.<sup>148</sup> It does so by creating another category of tax citizens: individuals who attain resident alien status because of their "substantial presence" in the United States.<sup>149</sup> Jumping ahead to paragraph 3 of the same subsection gives the definition of substantial presence—a mechanical test that measures the number of days an individual is present over a three-year period ending in the current year.<sup>150</sup> Exceptions are available to this rule for certain individuals, such as students, or for those who are present for less than half of the current year and can demonstrate a "closer connection" to another foreign country.<sup>151</sup>

The substantial presence test operates to pull individuals, other than formal citizens and LPRs, into the taxable community to render them tax citizens. But the substance and outcome of that determination is critically important for evaluating the fairness of our tax citizen definition. One of a set of fundamental questions of tax policy is who should pay taxes to a given government.<sup>152</sup> Stated differently, who belongs to the taxable

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147. I.R.C. § 7701(b) ("Definition of resident alien and nonresident alien.—(1) In general.—For purposes of this title (other than subtitle B)—(A) Resident alien.—An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii): (i) Lawfully admitted for permanent residence.—Such individual is a lawful permanent resident of the United States at any time during such calendar year.").

148. *Id.* § 7701(b)(1)(A). We might also characterize tax law's role in providing immigration law grounds for removal or bars to naturalization as indirect as well. Here, however, I confine indirect to decisions made within tax law and policy as opposed to instances when tax law is conscripted for use in another area of law.

149. *Id.* § 7701(b)(3)(A).

150. *Id.* The days of the preceding years are weighted to reduce their import.

151. *Id.* § 7701(b)(3)(B) ("Exception where individual is present in the United States during less than one-half of current year and closer connection to foreign country is established.—An individual shall not be treated as meeting the substantial presence test of this paragraph with respect to any current year if—(i) such individual is present in the United States on fewer than 183 days during the current year, and (ii) it is established that for the current year such individual has a tax home (as defined in section 911(d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the United States.").

152. Christians, *supra* note 69, at 97 ("This involves a very different and more difficult measurement of the representative whole for the purpose of determining fair shares. It involves first identifying whom a government can and should tax. . . . This definition means that deciding what is

community? An overly simplistic and revenue-focused answer to that question might be that nations should tax everyone they can. Doing so, however, would run afoul of a guiding principle of tax policy: fairness. Taxing everyone over whom a nation can assert jurisdiction would also conflict with international norms and agreements, as well as raise efficiency concerns that could ultimately minimize revenue collection.<sup>153</sup> The question that arises then, is why are resident aliens a part of the taxable community?<sup>154</sup> The inescapable Supreme Court case of *Cook v. Tait*<sup>155</sup> provides an early but incomplete response and points toward recognizing resident alien status, or tax citizenship, as codified performative citizenship.

## 2. Benefits and Tax—The Relevance of *Cook v. Tait*

Any discussion of citizenship and taxation would be remiss not to address the Supreme Court's opinion in *Cook*. The case involved a U.S. citizen living in Mexico who argued against assessment of income tax from property he held in Mexico. In its opinion, the Court rejected a territorial limit to the taxing power, holding that citizenship of the individual, not the location of him or his property, was the key concern. In doing so, the Court gave credence to the view that the benefits of citizenship extend beyond national boundaries<sup>156</sup>: "[T]he government, by its very nature, benefits the citizen and his property wherever found . . . [T]he basis of the power to tax was not and cannot be made dependent upon the situs of the property . . . [nor] upon the domicile of the citizen . . . but upon his relation as citizen to the United States and the relation to the latter to him as a citizen."<sup>157</sup> *Cook* continues to provide a judicial foundation for citizenship taxation as it articulated a strong benefit theory rationale for the justification to tax and attaches significant benefits to citizenship itself. One may dispute (and many have) the validity of the clear

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fair can only be undertaken after identifying first a pool of taxpayers and then the pool of resources available to them.").

153. See generally Christians, *supra* note 13; sources cited *supra* note 65.

154. Since its inception in 1913, the modern income tax has always sought to tax individuals living in and who have substantial connections to the United States. See Revenue Act of 1913, ch. 16, sec. II, 38 Stat. 114, 166 (1913) ("A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income . . .").

155. 265 U.S. 47 (1924).

156. *Id.* at 56 ("The contention was rejected that a citizen's property without the limits of the United States derives no benefit from the United States. The contention, it was said, came from the confusion of thought in 'mistaking the scope and extent of the sovereign power of the United States as a nation and its relations to its citizens and their relation to it. And that power in its scope and extent, it was decided, is based on the presumption that government by its very nature benefits the citizen and his property wherever found, and that opposition to it holds on to citizenship while it belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial.'" (internal quotation marks omitted)).

157. *Id.*

benefits and burdens relationship the Court so readily found, but the case endures as a statement of the relevance of the concept.<sup>158</sup>

Benefit theory remains important in international tax law and policy. Intuitively appealing, the theory suggests that the benefits an individual receives from her government—infrastructure, education, healthcare, to name a few—justify taxation. Numerous scholars challenge the utility of benefit theory, particularly in setting the proper rate(s) for the individual income tax,<sup>159</sup> and ability to pay is now the favored principle for supporting progressive taxation.<sup>160</sup> Nevertheless, it is generally accepted that benefits provided to individuals—whether citizens or residents—at least partially justify pulling individuals into the taxable community to be taxed on benefits received.<sup>161</sup> Thus, though benefit theory does little to help set a rate of tax, it should and does impact the assessment of whom to tax. Accordingly, the theory has been an integral part of international tax policy discussions and remains relevant in discussions of citizenship taxation.<sup>162</sup>

The rough benefit/burden aspect of benefit theory does more work in the context of the tax-immigration nexus, however. Arguably, it underlies why Justice Thomas's majority opinion in *Kawashima* may mistake the relevance of tax crimes to immigration law. Armed with the more nuanced concept of citizenship developed by social theory, we can recognize that laws governing citizenship participate in the process of "making" citizens.<sup>163</sup> Laws that define the requirements for citizenship police the boundaries of membership in a given community—an act that may reflect the values of that community (law as culture) or may, more

158. See AVI-YONAH ET AL., *supra* note 9, at 21–22.

159. *Id.* at 19–20; see also Reuven S. Avi-Yonah, *The International Tax Regime: A Centennial Reconsideration* (Univ. Mich. Pub. Law Research Paper No. 462, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2622883](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622883) (discussing the shifting relevance of benefit theory for determining the taxation of individuals and contrasting that with its relevance for corporations). See generally LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 18 (2002) ("[T]he benefit principle gives us no guidance on what the tax rate or rates should be . . .").

160. See, e.g., MURPHY & NAGEL, *supra* note 159; see also MEHROTRA, *supra* note 72, at 10 (discussing how advocates of a progressive tax system "played a pivotal role in supplanting the prevailing 'benefits theory' of taxation").

161. See AVI-YONAH ET AL., *supra* note 9, at 20 ("In most of the modern literature the 'ability to pay' theory is preferred. In the international context, however, the 'ability to pay' is meaningless until one has identified the persons or the enterprises whose wealth is to be taken into account . . . As a generalizing principle to deal with questions of selecting from among a world full of potential taxpayers those who will be taxed by a particular nation, the 'cost-benefit' analysis remains valuable."). Administrability of policing compliance is another consideration.

162. *Id.*; Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 13, at 478 ("More fundamentally, as discussed above, a benefits analysis generally does not dictate the proper level of income-based taxation. Rather, it merely determines whether sufficient grounds exist for exercising some kind of tax jurisdiction."); Mason, *supra* note 13, at 173 (stating that benefits theory "carries some weight" in justifying keeping nonresident U.S. citizens in the taxable community); cf. Christians, *supra* note 13, at 9 (stating that benefit theory has not provided a normative principle for source jurisdiction).

163. For an introduction to this discussion, see *THE ANTHROPOLOGY OF CITIZENSHIP: A READER* 10 (Sian Lazar ed., 2013); sources cited *supra* notes 12–16; discussion *supra* Part II.

aspirationally, attempt to discipline individuals to be more ideal versions of themselves (law as domination/discipline).<sup>164</sup> A statement that borders on truism is that paying taxes is part of the fundamental bargain individuals make with their government. In exchange for the benefits of citizenship, the individual takes on the responsibility of paying taxes.<sup>165</sup> There is, then, something special about tax. Moreover, the purchase that this idea has in popular rhetoric, case law, and the presence of the tax-immigration nexus itself suggests that we, as tax scholars, must continue to wrestle with its implications, despite its weaknesses.

A district court in Hawaii captured the special relevance of tax compliance to citizenship as it considered whether debt to a private party barred naturalization. In evaluating the petitioner's denial of naturalization for a lack of finding of good moral character, the court noted that the petitioner had "paid his taxes dutifully."<sup>166</sup> As it granted the naturalization petition, the Court reasoned:

Taxes and traffic fines are obligations owed to the government. They fund public expenditures that help all residents. The civil judgment here was owed to a private party. Even ignoring the apathy of this judgment creditor and Plaintiff's contentions about the wrongfulness of the judgment in the first place, failure to satisfy a debt to a private party is less of an "evil" against the good order of the United States than failure to pay taxes or traffic fines.<sup>167</sup>

Tax offenses are relevant to immigration not only because they are illegal or because they involve fraud or deceit, but because they represent a breach of the basic benefit/burden agreement between the State and its citizens; because noncompliance with tax harms the "good order" of the sovereign and all its citizens. To be sure, this benefit/burden bargain may not be in the mind of every immigration official applying the immigration laws or every Congressman or woman as he or she drafted or voted on the passage of relevant provisions of the INA. Rarely are cultural concepts so neatly uniform. But the commonplace nature of the assertion that we pay taxes because of the benefits we receive from the government, and the enforcement of that idea found in immigration law's contributions to the tax-immigration nexus, support the idea that tax does play an important and unique role in "making" citizens—a role that it should acknowledge and account for in its own law and policy.

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164. THE ANTHROPOLOGY OF CITIZENSHIP, *supra* note 163, at 12–16 (summarizing a range of important anthropological work on the subject).

165. See *Abulkhair v. Bush*, No. 08-CV-5410 (DMC)(MF), 2010 WL 2521760, at \*9 (D.N.J. June 14, 2010), *aff'd*, 413 F. App'x 502 (3d Cir. Feb. 9, 2011). Across disciplines, this idea is ever-present.

166. *Puciaty v. U.S. Dep't of Justice*, 125 F. Supp. 2d 1035, 1039 (D. Haw. 2000).

167. *Id.* at 1041.



Recent legislation provides further evidence of the depth of purchase of the benefit/burden argument and tax compliance. The recently enacted FAST Act created § 7345, a section that authorizes the revocation of an individual's passport for "seriously delinquent tax debt."<sup>168</sup> Among other requirements, the debt must be at least \$50,000.<sup>169</sup> The efficacy of the provision, which was signed into law in December 2015, is yet to be seen.<sup>170</sup> The desire to keep those with tax debts in country likely stems, at least in part, from a desire to keep tabs on the person and his assets. It also, however, seems to fit within a trend, discussed at length in Professor Joshua Blank's excellent *Collateral Compliance*, to more expressly tie tax compliance (the burden) to the conveyance of government benefits (herein, the passport).<sup>171</sup>

Though *Cook* addressed the taxation of a nonresident citizen, the principle upon which it relied—that benefits provided justify taxation and keep a person in the taxable community—applies to taxation of resident noncitizens as well. In name, we tax resident noncitizens upon the basis of their presence as residents (residence-based taxation). Taxation upon residency is a widely accepted principle and I do not dispute the validity of that principle.<sup>172</sup> What I do problematize, however, is how we should understand the substance of connections for which we use residence as a proxy.<sup>173</sup> Existing scholarship accepts residence as such, or views citizenship as a proxy for residence or domicile. In the language of social theory, residence in tax is commonly viewed as an example of law as dispute resolution. More than one sovereign may lay claim to the income of individual—the country "where income is produced (the source

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168. I.R.S. § 7345(b) (2012).

169. *Id.*

170. Family law uses a similar tactic to attempt to enforce child support. 22 C.F.R. § 51.60 (2012) ("The applicant has been certified by the Secretary of Health and Human Services as notified by a state agency under 42 U.S.C. 652(k) to be in arrears of child support in an amount determined by statute."). The tactic is generally held to be unsuccessful. See Drew A. Swank, *The National Child Non-Support Epidemic*, 2003 MICH. ST. DCL L. REV. 357, 367 (2003) ("Others, such as passport denials or revocations, result in payment of child support so infrequently that it is nearly impossible to do a quantitative analysis.").

171. Joshua D. Blank, *Collateral Compliance*, 162 U. PA. L. REV. 719, 740–42 (2014) (analyzing when tax compliance may benefit from non-tax (collateral) sanctions for specific behavior and discussing whether revocation of a driver's license for tax noncompliance may support tax compliance).

172. Zelinsky, *supra* note 13, at 1291 ("[O]ther nations tax individuals on their global income and holdings only if such individuals reside in these nations.").

173. I am not the first to challenge the concept of residence. Allison Christians succinctly states: "[R]esidence is a thin concept that can be defined by almost any metric." Christians, *supra* note 13, at 7. Christians highlights the failings of past and current attempts to articulate a principled concept of the appropriate bounds of "taxpayer." As part of that project she challenges the concept of residence and the impacts of that weakness on tax justice. This issue is also explored in Allison Christians, *Putting the Reign Back in Sovereign*, 40 PEPP. L. REV. 1373, 1389 (2013) ("One of the enduring problems for those who study international taxation from a normative perspective is that states have constantly and consistently failed to assert a comprehensively justifiable definition for the taxing jurisdiction."). If residence is essentially a proxy for domicile, as Edward Zelinsky persuasively claims, and citizenship is a more administrable proxy for the same, query how substantively distinct are these three concepts.

jurisdiction)” or the country in which the income is “consumed or saved (the residence jurisdiction).”<sup>174</sup> Defining residence and source are, then, means of determining when a nation should yield its taxing jurisdiction. Or, in more general terms, source and residence are mechanisms of conflict resolution.<sup>175</sup>

Considering residency within the context of the tax-immigration nexus leads to the following conclusion: residence, particularly in the case of LPRs, should also be understood as a proxy for performative citizenship.<sup>176</sup> In the terms of social theory, residence is an example of law as culture and law as discipline/ domination. A legal expression of the belief that those who fall within the resident definition are, in substance citizens, if not legally so. And, that as performative citizens, they must fully perform their citizenship by complying with the tax law. Arguing that residency is a proxy for performative citizenship does not diminish the role that the residency definition serves in determining the proper taxing jurisdiction. Legal rules can serve more than one purpose. But, by embracing a more nuanced understanding of the substance of the residency rules, we are better poised to evaluate the fundamental fairness of our tax regime as applied to those individuals who we pull into the taxable community. To support this proposition, let us return to the substantial presence definition.

The substantial presence test<sup>177</sup> is what renders authorized and unauthorized immigrants tax citizens, pulling them into the taxable community. The test is the product of an attempt to clarify an area of law that had

174. Avi-Yonah, *supra* note 69, at 1305–06.

175. Much of the theory of residence and source developed with a focus on business income. For an excellent history of international taxation and the concepts of residence and source, see GRAETZ, *supra* note 69.

176. Edward Zelinsky argues that the United States is not out of step with the rest of the world because other nations’ concepts of residency target an individual’s domicile. Citizenship, in Zelinsky’s view, is essentially just “an administrable, if sometimes overly broad, proxy for . . . domicile.” Zelinsky, *supra* note 13, at 1291.

The United States’ worldwide taxation of its citizens is less different from international, residence-based norms than is widely believed. . . . Because citizenship and domicile resemble each other, and because other nations define residence for tax purposes as domicile, the U.S. system of citizenship-based taxation typically reaches the same results as the residence-based systems of these other nations, but reaches these results more efficiently by avoiding factually complex inquiries about domicile.

*Id.* at 1289.

177. Though short-lived, the Code has been in the business of explicitly defining citizenship. In a 2006 article, Michael Kirsch details the enactment of two Code provisions that severed the Code’s definition of formal citizenship from that of immigration and nationality law:

New Internal Revenue Code section 877(g), also enacted by the AJCA, creates a second tax code departure from the nationality law definition of citizenship. Whereas section 7701(n) focuses on the timing of citizenship loss, section 877(g) addresses the period following citizenship loss. Pursuant to section 877(g), certain individuals who lose citizenship under the nationality law and have that loss recognized for tax purposes under section 7701(n) may, nonetheless, be treated as citizens for tax purposes in future years.

Michael S. Kirsch, *The Tax Code as Nationality Law*, 43 HARV. J. ON LEGIS. 375, 386 (2006).

been highly fact-intensive and led to inconsistent outcomes.<sup>178</sup> Substantial presence thus arose as an objective proxy for a subjective inquiry. Prior to the adoption of the test, courts looked to a range of factors to determine whether an individual was a resident: whether the individual had benefitted economically from being in the United States,<sup>179</sup> whether the individual had an intent to remain in a given country,<sup>180</sup> and where an individual owned a home or where her family lived.<sup>181</sup> Pre and post-adoption of the substantial presence test, the law labels the metric for an individual's investment, both social and economic, in the country in which she lived as residence. But substance sometimes differs from labels. Though courts struggled with distinguishing residence from domicile, or defining the scope of relevant facts and circumstances to consider, the key question they were trying to assess was: are you invested and integrated in the national community enough to justify taxation? Put in the language of a social theory of citizenship: are you acting like a citizen such that you should bear one of citizenship's burdens (or privileges), namely, paying taxes?

The closer-connection exception to the substantial presence test gives more insight to the factors Congress deems relevant to determine whether an individual is a tax citizen. Part IV of Form 8840—the form an individual must file to attempt to avoid resident status under the substantial presence test—asks a number of questions regarding the individual's ties to a foreign country. Those questions include social and economic connections: Where was your family located in the relevant

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178. *Preece v. Comm'r*, 95 T.C. 594, 602 (1990) ("Section 7701(b)(3)(A) was intended to replace the more complex facts and circumstances test of section 1.871-2, Income Tax Regs., for purposes of determining whether an alien was a resident of the United States. H. Rept. No. 98-432, vol. 1 at 222 (1983)."). For further discussion of the history of the test and a proposal for a humanitarian exemption when individuals flee violence in their home countries, see generally Hoose, *supra* note 13.

179. *Comm'r v. Nubar*, 185 F.2d 584, 586 (4th Cir. 1950) ("Upon these facts, we think that the conclusion of the Tax Court that taxpayer was an alien non-resident and was not engaged in business in the United States was clearly erroneous, whether regarded as a conclusion of fact or as a conclusion of law. We find nothing in the law or in the facts to justify the exemption of this alien, who had lived in our country during the war years because of the difficulties and dangers of departure, and who had availed himself of his presence here to make a fortune by trading on our exchanges, from taxes required of others by the country who protection he had enjoyed and whose economic organization he had utilized for his profit. On the contrary, we think it clear that he was not a non-resident alien within the meaning of the statutory exemption and that he was engaged in business within the United States so as to take him without the exemption even if he were properly considered a non-resident alien." (footnote omitted)). The Fourth Circuit does make a distinction between residence and domicile, finding residence to be the more impermanent of the two concepts. *See id.* at 587. Such a view runs counter to my argument that residence is a proxy for performative citizenship. However, the court itself says the distinction between the two is hard to discern. *See id.* ("The word 'resident' (and its antonym 'nonresident') are very slippery words, which have many and varied meanings."). Importantly, the tie breakers for resident alien status seen in treaties, case law, and the closer connection exception track traditional markers of performative citizenship. As such and in light of the tax-immigration nexus, I resolve the ambiguity by understanding residence as a proxy for citizenship rather than a less permanent connection.

180. *Seeley v. Comm'r*, 14 T.C. 175, 180 (1950), *aff'd in part, rev'd in part*, 186 F.2d 541 (2d Cir. 1951).

181. *White v. Comm'r*, 22 T.C. 585, 592-93 (1954).

year(s)? Where were your belongings? Where were you registered to vote? Where were your bank accounts? Where did you earn the majority of your income? Where, if applicable, were you entitled to the benefit of national health care?<sup>182</sup> These questions, taken together, attempt to identify the community in which an individual is substantially invested per a comprehensive concept of citizenship. The one in which she lives her life, conducts business, exercises civil rights, and where she has deep and significant social ties. These types of connections, taken together, constitute the multiple aspects of a social theory of citizenship.

Of course an individual may have deep economic and social ties to a nation of which she is not a citizen.<sup>183</sup> In that case, then, perhaps residence is just residence—a sufficient tie to subject an individual to tax or to solve the problem of determining the appropriate taxing authority, but not a proxy for an individual being a citizen in all but name. But to come to this conclusion would mean adopting a narrow, legalistic, status-based definition of citizenship—the very definition of citizenship social theory suggests is incomplete at best.

When we understand citizenship as a mix of legal status, rights, obligations, and belonging, then where we see attempts to identify these ties, we find an effort to identify citizenship. Unsurprisingly, the legal status looms large in tax as it provides the statutory basis for citizenship-based taxation (CBT). But we do not confine CBT to formal citizens alone. Instead, tax looks to markers of the other connections and actions through which we identify citizenship and through which individuals perform their citizenship. Though it labels LPRs and those who are substantially present as resident aliens, the substance of the connections § 7701 defines as residence, in fact track and codify a concept of performative citizenship. Thus, we assert a right to tax because individuals are living and acting like citizens. In brief, the concept of tax citizenship inherent in the resident alien status and its codification of performative citizenship flags LPRs as essentially indistinguishable from formal citizens and taxes them accordingly.

The robust tax-immigration nexus supports reconceptualizing residence as performative citizenship. The nexus makes very clear that tax compliance is a critical aspect of defining who is worthy of citizenship

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182. Internal Revenue Serv., Dep't of the Treasury, Form 8840: Closer Connection Exception Statement for Aliens (2016), <https://www.irs.gov/pub/irs-pdf/f8840.pdf>.

183. An individual may have deep connections to multiple nations and depending upon the citizenship laws of those countries may simultaneously be a citizen of such countries. The fact that an individual has citizenship, whether performative or legal, in multiple jurisdictions does not defeat the argument that the United States' definition of residence relied upon a concept of performative citizenship. Rather, it simply implies the need for tiebreaker or apportionment rules. *See, e.g.*, MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL ch. 2, art. 4.2 (ORG. ECON. CO-OPERATION & DEV. 2003), <http://www.oecd.org/tax/treaties/2014-model-tax-convention-articles.pdf> (describing examples of tiebreaker rules and procedural requirements); Internal Revenue Serv., *supra* note 182.

and what it means to be a citizen. In the language of anthropology, the tax citizen category—by treating noncitizen residents the same as formal citizens—serves two purposes. First, it draws immigrants into the full responsibilities of citizenship, respecting the understanding that tax citizens lack only formal status but are substantively citizens in a performative way. Second, it supports the immigration law project of directing individuals into the behavior expected of citizens—herein, tax compliance—where violation of that norm results in expulsion from the group.<sup>184</sup> Both goals impact the fundamental fairness of the foundational question that runs throughout this Article: who should be subject to tax? The answer, suggested by the tax-immigration nexus, is that it is those individuals who are formally *or* substantively citizens. When tax law lacks a formal marker of citizenship, it turns then to the informal one of performative status found in the resident alien definition.

Taking stock of the contributions of the tax-immigration we find the following: immigration law elevates tax compliance as a key factor in defining who is eligible for citizenship or even who may remain in the country. Further, tax law uses both a formal and informal definition of citizenship to achieve two ends: (1) to identify those who belong to the taxable community; and (2) to support the disciplinary project of immigration law. The impact of these insights for tax law and policy is the subject of Part IV.

#### IV. A NEW APPROACH TO UNDERSTANDING CITIZENSHIP AND TAXATION

Recognizing the existence and extent of the tax-immigration nexus provides an opportunity to reassess the fairness (or unfairness) of the current tax regime as applied to lawful permanent residents. Recall that the United States taxes formal citizens and tax citizens alike, at the same rates and by the same laws. Born or naturalized citizens are, in effect, considered essentially indistinguishable from tax citizens for tax purposes. But full recognition of the tax-immigration nexus challenges the notion that LPRs, who are *only* tax citizens but not formal citizens, are indistinguishable. This final Part explores the meaningful distinctions between tax and formal citizens for tax policy and suggests changes to reflect these differences.

##### *A. Benefit Theory, the Tax-Immigration Nexus, and the CBT Debate*

Recent scholarship on citizenship and tax overwhelmingly focuses on whether the U.S. system of worldwide taxation based upon citizenship is an appropriate principle for individual taxation.<sup>185</sup> Scholars defending

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184. See *supra* Parts II & III (discussing anthropology, law, and citizenship).

185. See *supra* note 13, for the principle articles on this topic. Notably, however, a few tax scholars have addressed other aspects of the citizenship and taxation discussion. See, e.g., Nancy C. Staudt, *Taxation and Gendered Citizenship*, 6 S. CAL. REV. L. & WOMEN'S STUD. 533 (1997) (dis-

CBT do so on the grounds that citizenship confers significant benefits, that it serves as an administrable proxy for residence or domicile, or that it indicates membership in the community of taxpayers to whom ability to pay principles should apply.<sup>186</sup> Scholars who challenge worldwide taxation on the basis of citizenship find the benefits of citizenship to be inadequate, citizenship to be a poor proxy for community membership, or the regime to be inefficient and inadministrable in practice.<sup>187</sup> And while scholars in both camps recognize the role of social theory in defining citizenship and the benefits and burdens of citizenship, they focus largely on a formal, legal definition of citizenship in tax.<sup>188</sup>

Driving much of the recent tax scholarship and news coverage of CBT<sup>189</sup> is a concern for the system's impacts on nonresident U.S. citizens. This focus is too narrow, and a shift to view nonresident citizens alongside LPRs illustrates the negative equity impacts of that narrow view. Both nonresident U.S. citizens and LPRs have a version of imperfect citizenship. Nonresident U.S. citizens possess formal citizenship but do not or cannot avail themselves of the full array of benefits that citizenship affords and, though they may have deep ties to the United States, cannot perform their citizenship in the same way as a resident individual. Resident LPRs may benefit more extensively from government services and more easily perform their citizenship but lack the formal status of being a citizen. Both groups, then, have grounds to argue that the burdens of their imperfect citizenship, whether formal or performative, outweigh the benefits. Despite this commonality, however, the impact of CBT on LPRs is largely unexplored. The focus of this part is to remedy that fact.

Benefit theory, introduced in Part III, is one of the factors considered in current evaluations of citizenship-based taxation. The set of relevant benefits for consideration in CBT (or other attempts to define simi-

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curring how tax law may shape women's participation in public and private life and, thereby, influence their ability to achieve full citizenship).

186. See, e.g., Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 13; Zelinsky, *supra* note 13, at 1320–24. Scholars may combine or refine these grounds for citizenship-based taxation but the drivers of these grounds are the bigger principles of tax policy of fairness and administrability. Supporters of citizenship-based taxation also discuss efficiency concerns regarding the incentives created by departing from the current regime but the goals of fairness and administrability seem to dominate. See, e.g., Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 13.

187. See Avi-Yonah, *supra* note 13, at 680–85; Blum & Singer, *supra* note 13, at 705–11; Mason, *supra* note 13, at 189–224.

188. Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 13, at 480–84 (describing the challenges of defining the taxable community); Mason, *supra* note 13, at 228 (noting the implications of noncompliance for immigration); *id.* at 189–211 (discussing more generally the balance of burdens and benefits of citizenship and challenges of delimiting community membership); Zelinsky, *supra* note 13, at 1303–12 (discussing different models of citizenship and their implications for the benefit theory assessment of citizenship-based taxation).

189. In addition to scholars writing on the topic, there are a number of vocal advocacy groups for U.S. citizens who live abroad, most notably, American Citizens Abroad. To learn more of their views on CBT and other issues affecting nonresident U.S. citizens, see AM. CITIZENS ABROAD, <https://www.americansabroad.org/> (last visited Feb. 6, 2017).

larly situated individuals) is subject to debate, as is valuation of those benefits. Nevertheless, if we accept that benefit theory is relevant in defining the taxable community—as case law, scholarship, and the tax-immigration nexus suggest we must, at least in part—we have to attempt the project. One goal of tax policy is to achieve horizontal equity—meaning taxing similarly situated individuals the same.<sup>190</sup> Knowing the benefits available to and utilized by individuals helps us define similarly situated individuals. Though determining who is similarly situated to whom is an immensely challenging task, it is one we continue to wrestle with as we evaluate one of three core considerations of tax policy: fairness or equity.<sup>191</sup> The tax-immigration nexus contributes to this difficult work.

Current scholarship takes stock of the benefits of citizenship and leans toward the view that the burdens of CBT outweigh the benefits for U.S. citizens abroad. But considering the taxation of LPRs informs this discussion by identifying the value of a heretofore unexplored benefit LPRs lack: permanence of status. Compare an LPR living in Montana to a U.S. citizen living in Paris. We may be inclined to say that the LPR receives more benefits from the United States that justify taxing her than does the U.S. citizen abroad—the LPR utilizes U.S. infrastructure, may send her children to public school, and enjoys the protection of U.S. laws, to name a few.<sup>192</sup> But U.S. citizens, whether resident or not, whether performing their citizenship or not, have a permanent status, should they choose to retain it. As mere tax citizens, LPRs lack that same permanence of status accorded formal citizens, though they may have stronger purchase on community membership because of their performative citizenship. Permanence of status<sup>193</sup> is thus a key distinction between resident tax citizens and U.S. citizens, and the inherent insecurity of sta-

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190. Like many policy concepts, horizontal equity has been the subject of criticism. *See, e.g.,* MURPHY & NAGEL, *supra* note 159, at 37–39. It persists, however, as one of many tools used to assess the fairness of a given provision or tax regime. *Id.* at 37.

191. Tax systems are regularly evaluated by how well they satisfy three key concepts: equity/fairness, efficiency/neutrality, and administrability (simplicity/complexity).

192. *See, e.g.,* Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 188, at 478 (“While citizens abroad do not enjoy some of the benefits available to citizens within the United States, U.S. citizens at home do not enjoy some of the benefits provided to citizens abroad such as the personal and property protection discussed above.”); Mason, *supra* note 13, at 193–94 (stating that even if there are residual benefits of citizenship for nonresident U.S. citizens, those benefits cannot justify taxation to the same extent as resident U.S. citizens).

193. The right to re-enter is often cited as one of few or two benefits (voting being the second) a nonresident U.S. citizen enjoys. Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 188, at 478. Permanence of status should be distinguished from the right to re-enter the United States, a benefit discussed by both opponents and supporters of citizenship-based taxation in evaluating whether the benefits of U.S. citizenship support the current regime. Permanence of status is broader than right to re-enter as it encompasses the right to remain in the United States regardless of non-compliance with the tax laws as well as the right to re-enter.

tus that tax citizens face, made even greater post-*Kawashima*, should be treated as a relevant difference for tax benefit/burden assessments.<sup>194</sup>

Permanence of status and the ability to re-enter the country are different aspects of a core benefit: security. Formal citizenship grants security—the right both to re-enter the nation of one’s citizenship and the right to remain there. An LPR may be secure in her nation of citizenship but lacks that same security in the nation to which she immigrates. Writing on the role emigrants play in constructing citizenship, Kim Barry eloquently captures the value of this security and, by extension, the effects of insecurity: “The import of that security for emigrants (and its concomitant insecurity for even those emigrants who are long-term non-citizen residents of immigration states) should not be underestimated. Only where residence is legally secure can individuals ‘plan their lives accordingly.’”<sup>195</sup> In other words, security of permanent status, not simply the right to re-enter, is a meaningful benefit of citizenship that emerges in the comparison of LPRs and U.S. citizens in light of the tax-immigration nexus.

Now consider the following comparisons and distinctions: resident citizens and legally present noncitizens have essentially equal access to many benefits and are taxed similarly,<sup>196</sup> an outcome benefit theory and ability to pay can support. Yet if we understand the security of permanent status as a benefit, a distinction emerges between resident citizens and noncitizens—one that may justify differing tax treatment. Both groups perform their citizenship but performative citizenship results in tax citizenship, not formal citizenship. Nonresident citizens, the population of concern in the current literature, may avail themselves of fewer benefits than do resident noncitizens, perhaps justifying a lower tax burden.<sup>197</sup> But does that assessment change when we add into the mix the security of permanent status denied LPRs? Perhaps. The difficulty of using benefit theory to assess horizontal equity makes it an imperfect

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194. Cf. Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899, 900 (2013). Spiro sees the distinction between citizens and noncitizens as largely formal, stating “the leakiness of immigration enforcement mitigates the consequence of this important formal differential [the fact that citizens enjoy absolute locational security].” *Id.*; see also Bloemraad et al., *supra* note 55, at 166 (“The challenges faced by undocumented migrants highlight the continued salience of the state, which through granting or withholding residency and citizenship status profoundly affects immigrants’ life chances.”).

195. Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 25 (2006).

196. For a full discussion of immigrant access to federal benefits such as TANF or SNAP, see RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL34500, UNAUTHORIZED ALIENS’ ACCESS TO FEDERAL BENEFITS: POLICY AND ISSUES 1–21 (2012).

197. Mason alludes to this idea, stating that that CBT advocates “argue that because nonresidents receive benefits from the United States, they should pay U.S. tax. Although this argument carries some weight, it cannot justify taxing nonresident Americans similarly to resident Americans who receive far more benefits.” Mason, *supra* note 13, at 173. Based upon her arguments advanced in the rest of the paper and our discussions, however, I doubt Professor Mason would see this as an acceptable response to CBT.



tool. Nevertheless, as it remains part of the international tax discussion, permanence of status should be considered a distinguishing benefit between U.S. citizens and LPRs.

Introducing permanence of status to the CBT morass—an outgrowth of the tax-immigration nexus—gives rise to at least two potential responses. First, those who argue against CBT might use the unfairness of the regime as applied to LPRs to bolster their argument against the status quo, as an additional weight on the scale that justifies overhaul of an unfair and inefficient regime. Second, pro-CBT scholars might use the same insight to argue, as I did above, that nonresident U.S. citizens are not so unfairly burdened as it may seem; that keeping citizens abroad within the taxable community is on par with subjecting LPRs to the same tax laws as citizens, despite their fundamental insecurity. Stated differently, both have weaknesses in the citizenship burden/benefit bundle but the current regime properly accounts for those weaknesses. This Article does not delve into a full-fledged analysis of CBT and, as such, I do not take a hard stance on CBT but rather suggest that the discussion requires analyzing the tax-immigration nexus and its implications.

### *B. Inequities of the Tax-Immigration Nexus: A Way Forward*

Tax law in itself cannot and should not determine the proper relationship between tax, immigration, and citizenship. Allowing individuals to live in the United States, whether temporarily or permanently, creates a ripple effect of collateral consequences, as each individual may be understood as a package deal of burdens and benefits. Each individual places his own demands upon the government, infrastructure, and public goods while making his own contributions. Immigration law, fiscal policy, political theory, anthropology, and sociology are clear contributors to the discussion of the relationship between tax, immigration, and citizenship.<sup>198</sup> A state must balance its desire to attract immigrants for economic and/or humanitarian reasons with the implications of the responsibilities that state bears to its residents and citizens. Revenue, and by extension, tax law and policy, are only part of that calculus.

Revenue is not the only goal tax law considers, however. Accepting that revenue is the primary goal of any tax system, U.S. tax law must also be cognizant of its intersection with immigration law and the equity concerns created therein. The tax-immigration nexus helps conceptualize a new benefit of formal citizenship: permanence of status. But the contribution of the tax-immigration nexus goes beyond benefit theory assessments, to push us to see the positive role tax law plays in defining citi-

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198. See Bloemraad et al., *supra* note 55, at 170 (“Finally, the study of citizenship and immigration cannot be viewed as uniquely the domain of immigration scholars. Rather, the intersection of citizenship and immigration raises broad issues of inequality, state power, and social cohesion.”). Accordingly, to the extent immigration law scholars view the tax-immigration nexus as too punitive, such scholars and policymakers could propose reforms from within immigration law.

zenship and making citizens. Specifically, the tax-immigration nexus suggests that treating LPRs fairly may require reforming existing tax law.

### 1. Considering an Immigration Law Solution

Before addressing the implications of the tax-immigration nexus for tax law and suggesting some avenues for reform or future research, it is prudent to pause and address a potential objection: can the inequities of the tax-immigration nexus be solved by immigration law? If one agrees that collateral immigration consequences lack proportionality with the tax offense(s) committed, should or could immigration law remedy the problem by deciding tax offenses are immaterial to deportation or naturalization considerations? Bypassing the debate of the unlikelihood of such reform, the answer is no. First, removing immigration law's contributions to the tax-immigration nexus would be an overreaction to the current inequities. There is value in immigration law emphasizing the importance of tax compliance to aspiring citizens—doing so serves an important expressive (law as culture) and training (law as discipline) function. In short, the tax-immigration nexus plays an important role in immigration law that should not be abandoned without careful consideration.

A different iteration of the objection may then arise, however, taking the view that a lack of proportionality in punishment created by immigration law is not a tax concern. This is also error. Disproportional sanctions for tax offenses can undermine the perceived fairness of the system, which can, in turn, have negative implications for tax compliance, even when those sanctions arise outside of the tax system.<sup>199</sup> The fact that it is immigration and not tax that punishes an individual differently for the same tax offense should not preclude considering a lack of proportionality for tax policy purposes. Indeed, tax policy scholars and advocates frequently consider the interaction of exogenous factors with substantive tax law.<sup>200</sup> Further, the fact that tax plays such an important

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199. Blank, *supra* note 171, at 778.

200. Examples of scholarship in this vein include discussions of the single-earner bias that note that the bias takes on a more problematic gender aspect in light of the social patterns of household work. Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2002–67 (discussing the single-earner bias and efficacy of common proposals to remedy gender discrimination in the Code). Edward McCaffery provides an excellent discussion of this bias in his article, *Taxation and the Family: A Fresh Look at Behavioral Biases in the Code*. Noting the gendered impact of the bias, McCaffery writes:

There is no priori reason to assume the wife should be the marginal earner . . . But the current tax structure tends to push toward a “primary-secondary” delineation among working spouses, marginalizing the lesser-earning person. Here, as elsewhere, it is crucial to consider social context in evaluating the tax laws—it is by failing to do so that ostensibly “neutral” ideology entrenches discriminatory patterns. . . . Historically, of course, wives have usually been the marginal earners. . . . The general lesson of the story is that married women are at the margins of the workforce—in terms of wages, power, and

role in policing citizenship and structuring its requirements supports the relevance of the nexus for tax policy purposes. The legitimacy of a tax system depends, in part, upon the legitimacy of the means it uses to define the taxable community. That community is defined both by tax and immigration law, and tax must acknowledge that fact.

Third, removing all collateral immigration consequences for tax offenses would not solve the problem that looms large for tax policy: that LPRs and U.S. citizens are distinguishable though they are treated as indistinguishable by current tax law. Even if tax offenses could not lead to removal or denial of citizenship, the insecurity of LPRs as compared to U.S. citizens would remain. The tax-immigration nexus allowed identification of this important distinction between LPRs and U.S. citizens, but dissolving the nexus would not dissolve that distinction. Further, tax policy may be able to benefit from a more finely-tuned tax-immigration nexus, as will be explored later in this part.

In the following subparts, I introduce three potential reforms, modified reporting requirements for LPRs, a credit, and a rate change, as well as identify areas for future research, both theoretical and empirical. The goal of these subparts is not to unequivocally endorse one or more specific reforms. Instead, I offer frameworks for reforms that respect and further develop the value of the tax-immigration nexus to both immigration and tax law, while reigning-in its inequitable effects.

## 2. Reducing the Likelihood of Tax "Footfalls"

The first proposal is, in some ways, the most modest. While, as subsequent discussion will show, a credit may be too limited in scope to achieve true equity for LPRs, a rate schedule change may swing too far in the opposite direction, granting too extensive relief in light of the similarities between LPRs and resident formal citizens. Even if we were interested in pursuing a different rate schedule for LPRs, the difficulty of valuing benefits, and, by extension, using benefit theory to set a rate, could make such reform unattainable. Another option presents itself, however, in the form of modified filing requirements as a middle ground solution between a credit and a rate schedule change.

Section III.B introduced the role tax law plays in the good moral character assessment for naturalization. The tax-immigration nexus runs a significant risk of an outcome—denial of naturalization—that is disproportionate to the offense—an alleged or established civil tax offense—at this point of connection. Accordingly, tweaking the nexus at this point would do much to remedy its inequities. Scholarship that ar-

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costs—and the tax laws contribute to this marginalization by putting the wife's income at the margins of the family's.

Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 993–94 (1993).

gues against CBT provides a potential direction for such a reform: Foreign Accounts Tax Compliance Act (FATCA) and Foreign Bank Account Report (FBAR) filing requirements.

A great deal of contemporary arguments against CBT draw upon the complexity of complying with FATCA and FBAR as support for abolishing CBT. Both FATCA and FBAR ostensibly target tax evaders by requiring individuals and, in some instances, third parties, to disclose information regarding foreign accounts and assets.<sup>201</sup> The general thrust of the criticism holds that the complexity of the regimes leads to inadvertent noncompliance and generates too significant a burden for well-meaning taxpayers.<sup>202</sup> An oft-cited standard for the required good moral character assessment in immigration is the conduct of the average citizen.<sup>203</sup> If there are widely held and legitimate concerns of whether U.S. citizens can comply, LPRs should receive the same concern. One may reasonably assume that LPRs, like the nonresident U.S. citizens who are commonly the focus of this literature, are likely to have properties or accounts in their country of citizenship. They are, then, likely to have to interact with this complex and deeply criticized regime. Acknowledging the tax-immigration nexus provides further support for arguments against FATCA and FBAR regimes. Short of overhaul, however, tax law can respond by creating a grace period of reduced reporting requirements for LPRs. Such a reform would address the insecurity of LPRs as compared to U.S. citizens, while respecting the overarching compliance goals that FATCA and FBAR aim to support.

Congress could enact provisions modifying the FATCA and FBAR rules as applied to LPRs.<sup>204</sup> LPRs could, for example, be exempt from reporting otherwise reportable foreign accounts or interests for five years, the same period discussed in the following rate schedule proposal.

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201. See INTERNAL REVENUE SERV., IRS FBAR REFERENCE GUIDE, <https://www.irs.gov/pub/irs-utl/irsfbarreferenceguide.pdf> (last visited Feb. 6, 2017); Allison Christians, *Paperwork and Punishment: It's Time to Fix the FBAR*, TAX NOTES INT'L, Oct. 2014, at 147, 147. To access the FBAR form, see *File the Report of Foreign Bank and Financial Accounts (FBAR) as an Individual*, BSA E-FILING SYSTEM, <http://bsaefiling.fincen.treas.gov/NoRegFilePDFIndividualFBAR.html> (last visited Feb. 6, 2017). To access FATCA Form 8938, see Internal Revenue Serv., Dep't of the Treasury, Form 8938: Statement of Specified Foreign Financial Assets (2016), <https://www.irs.gov/pub/irs-pdf/f8938.pdf>. FATCA also imposes third-party reporting requirements. Joshua D. Blank & Ruth Mason, *Exporting FATCA*, 142 TAX NOTES 1245, 1246 (2014).

202. See, e.g., Christians, *supra* note 201, at 147–48; Mason, *supra* note 13, at 213–15; Allison Christians, Assoc. Professor, H. Heward Stikeman Chair in Tax Law, McGill Univ., Address at the International Conference on Taxpayer Rights: Understanding the Accidental American: Tina's Story, (Nov. 18, 2015) (transcript), <http://www.taxanalysts.org/content/understanding-accidental-american-tinas-story>.

203. *Hussein v. Barrett*, 820 F.3d 1083, 1088–89 (9th Cir. 2016) (discussing 8 C.F.R. § 316.10(a)(2) and noting that “[t]he regulation instructs the USCIS to evaluate claims of good moral character on a case-by-case basis taking into account the enumerated elements in the section as well as the standards of the average citizen in the community of residence”); see *supra* note 122 and accompanying text.

204. 31 U.S.C. § 5314 (2012); I.R.C. § 6038D (2012).

The benefits of such a reform are twofold. First, foreign properties or interests have a more tenuous connection to the United States—their connection stemming from the presence of the taxpayer—than, for example, the wages an LPR earns at her job in her U.S. hometown.<sup>205</sup> A grace period of modified reporting is, then, a better-targeted reform than a rate reduction. A grace period would ensure the income with strong ties to the United States is taxed the same to LPRs and citizens on the same terms. Second, to the extent the complexity of FBAR and FATCA regularly give rise to inadvertent noncompliance, modified reporting requirements remove that point of nexus and potential inequity of the tax-immigration nexus, albeit temporarily. Stated differently, a modified reporting regime would lessen the possibility of FBAR and FATCA noncompliance being used to demonstrate lack of good moral character—a result that brings greater proportionality to the tax-immigration nexus by limiting the severe consequences of potentially excusable footfalls, without sacrificing its expressive and disciplinary aspects.

A modified reporting regime or similar reform need not be confined to FATCA and FBAR. Were other scholars, with different points of focus or expertise, to take up discussion of the tax-immigration nexus, other areas of potential footfalls might emerge which place LPRs at unnecessary risk of disproportionate consequences for their noncompliance. By remedying such concerns, tax law could find itself on stronger footing when it does assert the right to tax a given individual or item of income.

### 3. Tax Credit for Naturalization Costs

The path to citizenship is riddled with costs, many of them monetary. A recent Pew Research Center report indicates that many LPRs cite the costs of naturalization as a roadblock to becoming a U.S. citizen.<sup>206</sup> Filing fees for the Form N-400 alone can be as high at \$680.<sup>207</sup> Any costs for counsel or other assistance to complete the naturalization process add to the total price tag of naturalization. The financial cost of naturalization is not a tax issue but tax law could provide relief. Specifically, Congress could craft a refundable or partially refundable tax credit for qualifying naturalization costs. Consider the following hypothetical:

Ishita has been an LPR of the United States for twelve years. She averages taxable income of \$35,000 a year. Ishita has one child who qualifies as a dependent so her taxable income puts her in the 15% tax

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205. Exempting certain foreign accounts would not, of course, mean exempting money earned in the United States or derived from U.S. properties that was funneled into such accounts. Any modified reporting regime would have to take into account the creative force that is tax avoidance and evasion.

206. GONZALEZ-BARRERA ET AL., *supra* note 23, at 7, <http://www.pewhispanic.org/2013/02/04/the-path-not-taken/>.

207. U.S. Citizenship & Immigration Servs., *supra* note 91; *Additional Information on Filing a Fee Waiver*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/feewaiver> (last updated June 2, 2016).

bracket.<sup>208</sup> To put that cost in perspective, assuming Ishita is a single parent who uses daycare services, the \$680 filing fee represents almost an entire month's daycare costs.<sup>209</sup> Childcare costs are only one example of the potential budget challenges an LPR might face when trying to find the money to complete the naturalization process. A credit could increase Ishita's tax refund, perhaps freeing up the necessary funds to apply to become a citizen.<sup>210</sup> Such a credit could be keyed an individual's ability to pay, phasing out as an individual's taxable income increases.

The policy of subsidizing the costs of naturalization has support in current law. Indeed, UCSIS provides the possibility of a fee waiver for qualifying individuals.<sup>211</sup> To receive a waiver an individual must meet one of three requirements: he or a qualifying individual in the individual's household receives means-tested governmental benefits, the individual's household income is at or below 150% of the federal poverty level, or the individual is facing a qualifying financial hardship such as unexpected medical bills.<sup>212</sup> A credit would further the policy of recognizing financial restraints by extending it to another population: those individuals whose income exceeds current fee waiver limits, but for whom fees still present a significant challenge.

There are multiple benefits to a naturalization costs credit. First, such a credit would be a relatively minor change that would provide targeted relief to some LPRs. As such, it would join a number of credits that take account of costs taxpayers incur that the government deems worthy of subsidy, such as child care costs or investments in energy-efficient appliances.<sup>213</sup> It also represents a small nod to the fact that LPRs are meaningfully distinct from U.S. citizens and that the differences between

208. Rev. Proc. 2015-53, 2015-44 I.R.B. 615. This hypothetical assumes Ishita files as a head of household.

209. CHILDCARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILD CARE: 2014 REPORT, 40-41 (2014), [https://www.ncsl.org/documents/cyf/2014\\_Parents\\_and\\_the\\_High\\_Cost\\_of\\_Child\\_Care.pdf](https://www.ncsl.org/documents/cyf/2014_Parents_and_the_High_Cost_of_Child_Care.pdf). My analysis uses one of the least expensive states on which the state reported. *Id.* In one of the most expensive states the fee represents about half of the average monthly cost. *Id.*

210. Of course there would be a mismatch between the time of payment of the filing fee and credit. Recent changes, however, permit LPRs to pay naturalization fees by credit card. Presumably, then, an individual would aim to pay the fees toward the end of the taxable year to reduce the amount of time between payment and refund. Though this is an imperfect solution to the problem of supporting the naturalization costs of LPRs, it is at least a step in the direction of increased support.

211. *Additional Information on Filing a Fee Waiver*, *supra* note 207.

212. *Id.*

213. I.R.C. § 24 provides a child tax credit while § 25D defines a credit for qualifying residential property. *See* I.R.C. § 24 (2012); I.R.C. § 25D (2012). The wisdom of such credits that make tax a social policy tool is hotly debated. Whether or not tax should be a tool of social policy is not, however, the focus of this Article. For examples of this discussion, see STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* (1973); Edward D. Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1 (2010); Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 975-76 (1986).

the two groups may justify a slightly lower effective tax rate (created by a limited credit).<sup>214</sup>

Second, the presence of a credit for naturalization costs could have tax compliance benefits. Providing a targeted credit to low and lower income individuals would signal that the government supports the pursuit of citizenship by qualified individuals as it would show a willingness to subsidize that process where appropriate. The credit therein recasts the tax system from simple potential bludgeon to a partner in the path to citizenship. To the extent respect for the tax system and a perception of it as fundamentally fair have positive implications for tax compliance, such a credit could further incentivize compliance by the immigrant population by engendering a positive view of the Code, rather than just fear of the immigration consequences of noncompliance.<sup>215</sup>

Third and last, a credit has the benefit of being highly customizable.<sup>216</sup> A naturalization costs credit could be limited to only the Form N-400 filing fee or expanded to include the filing fee and some fees paid to a lawyer for assistance in the naturalization process. A credit could utilize a gradual phaseout as an individual's adjusted gross income increases to better target the identified population of need.<sup>217</sup> The possibilities

214. Some may challenge such a preference as unjustified or bad policy for its potential to encourage immigration. To the extent the reader does not consider immigration or naturalization to be a generally positive force, she may object to any subsidy in this area. However, to the extent we view immigration or naturalization of individuals already present in the United States to be a positive, subsidizing those costs to some degree could reap rewards.

215. See, e.g., Blank, *supra* note 171, at 769–71; Andrea Monroe, *Integrity in Taxation: Rethinking Partnership Tax*, 64 ALA. L. REV. 289, 293–94 (2012) (“Integrity seeks to create a cohesive and unified legal system that its members consider just and fair even when the pursuit of system-wide coherence demands the sacrifice of some justice or fairness in individual instances. Integrity thus fosters a legal system’s legitimacy, cultivating loyalty to the system despite disagreements about particular laws. The principle of integrity is seldom applied in tax scholarship. Yet integrity has a natural appeal in thinking about the discordant values of partnership taxation, which have left the system complicated, fractured, and bereft of a unifying core. Integrity also highlights the importance of legitimacy in subchapter K, where a system of voluntary compliance allows most partnerships to operate under an ‘honor code,’ with little risk of government audit.” (footnote omitted)).

216. What follows is draft language for a naturalization costs credit.

26 U.S.C.A. §\_\_\_ Naturalization Costs Credit

(a) Allowance of Credit

(1) In General—In the case of an individual, there shall be allowed as a credit against tax imposed by this chapter, the amount of qualified naturalization expenses paid by the taxpayer in the taxable year. [Note: if Congress decided to allow a credit for legal fees tied to naturalization, this language could be modified to allow the credit in the year after expenses were paid or delayed until naturalization is finalized.]

(b) Definitions

(1) Qualified naturalization expenses—The term “qualified naturalization expenses” means expenses paid by the taxpayer which are directly related to the taxpayer’s naturalization application and the naturalization application(s) of family member of the taxpayer.

(2) Family member—[Herein another decision would need to be made regarding how expansive the credit should be. A more conservative credit could limit the definition of family to that of § 267. A more extensive credit could adopt a broader view of family such as that of § 152.]

(c) Limitations

217. Tax expenditure analysis could inform the proper availability and amount of the credit. This Article makes no attempt to quantify revenue costs or dictate the appropriate scope of the credit.

are numerous, and more work would be necessary to take the preliminary concept of a naturalization costs credit to fruition. Nevertheless, it seems a conservative, nimble response to provide some relief to LPRs who face the insecurity and disproportionate burdens of tax citizen status.

#### 4. Tax Rates

This third, broader reform response is likely the most controversial of the three. Policymakers and scholars should consider whether the current tax regime—taxing tax citizens and U.S. citizens the same—is justified in light of the key differences between citizens and LPRs. There is little question that we *can* tax LPRs. But the decision that we *should* does not follow from the fact that we *can*. Nor does saying we should tax noncitizens answer the question of what is the proper rate of tax.<sup>218</sup>

The tax-immigration nexus makes evident that LPRs face disproportionate punishments—ineligibility for naturalization and removal—for the same offenses that result in monetary or criminal penalties for U.S. citizens. What to make of the lack of proportionality is less clear. An overreaction to the unfairness of the insecurity and disproportionate punishments LPRs face would be to exclude them entirely from the taxable community. A tax system that does not tax noncitizens living, working in, and benefiting from its economy and laws would shift the income tax burden entirely to citizens; a result that seems unfair to citizens and would be bad economic policy. Thus, tax law's codification of performative citizenship in the resident alien definition seems justified. After all, LPRs and U.S. citizens may be indistinguishable when judged by their enmeshment in their communities and both receive many of the same benefits. Tax citizen status is, herein, an example of law as culture—we tax LPRs the same as citizens because we believe they are, in many ways, substantially similar. Tax citizen status also performs a disciplinary role: if you want to become a citizen you have to play by the same rules as citizens. The significant role tax compliance plays in the tax-immigration nexus shows that paying taxes is a key part of the process of constructing good citizens. But the tax-immigration nexus also drives home that despite all the ways in which LPRs may resemble citizens and why it may be good immigration policy to tax them as such, they are not full, formal citizens. Taxing LPRs by the same laws and at the same rates may then emerge as being fundamentally unfair, as it fails to account for the significant ways in which tax citizenship falls short of formal citizenship—most notably permanence of status (or lack thereof). Perhaps, then,

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218. Scholars recognize the same issues are at play in the discussion of taxation of nonresident citizens. Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 13, at 446–48; Mason, *supra* note 13, at 175–77; Zelinsky, *supra* note 13, at 1314–16. A founding principle of international taxation that persists in tax treaties is that a source country's laws “must not tax such income in a manner that discriminates against foreigners.” GRAETZ, *supra* note 69, at 33. Taxing noncitizens at a lower rate would not seem to run afoul of this principle.



the appropriate reaction to the challenge of taxing LPRs—clear members of the taxable community but insecure as compared to formal citizens of that community—is to tax LPRs at lower rates.

Before addressing the likely objections to this proposed reform, let me set forth a basic structure. Taxing noncitizens at modified rates could be accomplished without overhauling the current tax regime.<sup>219</sup> Lowering the tax rate on LPRs could take the form of an additional rate schedule and filing status added to § 1 with modified income thresholds. Recall Ishita whose \$35,000 of taxable income places her in the 15% bracket as a head of household filer. Under the head of household rate schedule, Ishita jumps into the 15% bracket with taxable income over \$13,250.<sup>220</sup> If we believe LPRs should have the opportunity to earn more income before having that income taxed at a 15% rate we could set the threshold for the 15% bracket at a higher point—\$17,250, for example. As such, where Ishita's taxable income results in liability of \$4,588 in the head of household brackets her "LPR" brackets would lead to only \$3,988 of tax liability.<sup>221</sup> Other options for reducing tax rates on LPRs include allowing exclusion of or a deduction for some portion of an LPR's income not unlike the foreign earned income exclusion of § 911.<sup>222</sup> As with a credit, the options for how to structure tax relief to reduce LPRs' share of the tax burden are multiple and this Article does not detail specifics, but rather simply suggests that such a reform may be appropriate. With the broad sweeps of a rate reduction in mind, let us turn now to potential objections to such a reform.

Three significant objections arise when considering tax relief targeted at individuals with a particular status (or lack thereof). First, that providing tax relief to LPRs is unfair to citizens.<sup>223</sup> To the extent an LPR and resident citizen receive substantially the same benefits from their local, state, and the federal governments, perhaps they should be taxed at the same rates. Or to the extent an LPR earns the same amount of taxable income as a citizen, then both share a similar ability to pay and should be taxed at a given rate. Why then, should an LPR receive a tax cut? The

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219. The European Union has seen differing treatment on nonresidents and residents in member countries. HUGH J. AULT & BRIAN J. ARNOLD, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* 521 (3rd ed. 2010). Attempting to balance sovereignty of member countries with the goal of free movement for individuals, the Court has found that tax provisions that treat nonresident taxpayers differently than resident taxpayers violates prohibitions against discrimination on the basis of nationality. *Id.* Among the differing treatment the Court prohibited are laws that taxed nonresidents at higher rates than residents. *Id.* at 522–21.

220. Rev. Proc. 2015-53, 2015-44 I.R.B. 615.

221. Depending upon how the brackets are set, it is possible an existing status could result in lower tax liability than the LPR status. In that case, an LPR could be permitted to simply elect the more favorable schedule.

222. I.R.C. § 911 (2012) (excluding qualifying foreign income from U.S. tax).

223. Whether such a reform could pass with the current Congress is a different issue than whether it would make for a more equitable tax system. I do not attempt herein to address that issue.

answer to that question goes back to the significance we ascribe to the insecurity LPRs face because of the tax-immigration nexus.

Using benefit theory to support a different rate schedule departs from policy justifications for differences in existing rate schedules. For example, ability to pay, not benefit theory, supports the separate head of household rate schedule. Is an LPR's status as a tax citizen similarly relevant? LPRs face naturalization costs that impact their ability to pay tax, but those costs come in isolated years. Additionally, those costs may be seen as elective consumption decisions distinct from dependent support costs, a view that would cast naturalization costs as a nondeductible personal expense or an issue better remedied by the proposed credit.<sup>224</sup> The insecurity LPRs face on account of tax law's role in immigration law and policy persists unless or until that LPR naturalizes, however, at which time she transitions from tax citizen to formal citizen. It is not, then, a one-time cost or investment easily solved by a credit. An LPR rate schedule would ultimately be based upon the inequities seen by applying benefit theory in light of the tax-immigration nexus, rather than ability to pay. As such, the LPR schedule and filing status would be a departure from the norm of current tax policy, though not necessarily an unwarranted one.

Second, one might object to a different rate schedule for LPRs out of a concern for the incentives it could create to remain an LPR rather than naturalize and the corollary revenue effects. Proponents of marriage penalty relief levy similar criticisms of the current tax outcomes of the married filing jointly schedule for some couples. The logic goes as follows: because being married increases tax liability for some couples, tax law disincentivizes marriage in a meaningful way.<sup>225</sup> I (and others) believe this argument assumes too much.<sup>226</sup> Marriage and citizenship are emotionally, social and culturally-charged statuses that individuals desire for any number of rational and irrational reasons. Despite my own incli-

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224. See I.R.C. § 262 (2012) (specifying that personal expenses are not deductible). Drawing the line between consumption decisions that are ignored for tax and those that should give rise to some adjustment to tax liability is no easy task. To some scholars, children are a personal consumption decision. See, e.g., HENRY SIMONS, *PERSONAL INCOME TAXATION* (1938). Ultimately, resolving these conflicts requires returning to foundational philosophical and social policy discussions that are subject to significant disagreement.

225. See, e.g., James Pethokoukis, *Here's Exactly How Marriage Penalties Discourage Marriage*, AEIDEAS (Feb. 25, 2014, 11:26 AM), <https://www.aei.org/publication/heres-exactly-how-marriage-penalties-discourage-marriage/>.

226. There are many compelling reasons to be concerned with the relevance to and treatment of marriage under the tax code. See Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 805–07 (2008); Tessa R. Davis, *Mapping the Families of the Internal Revenue Code*, 22 VA. J. SOC. POL'Y & L. 179, 191–93 (2015); Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 652–53 (2010); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 131–34 (1998); Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1568 (2008); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 1–2 (2000).

nation to believe that tax law and policy matter to the daily lives of individuals, there are limits. A less speculative response to this objection would be to simply limit the availability of the preferential rate schedule to a set period of time, not unlike the surviving spouse rules that allow an unmarried individual to continue to use the married filing jointly status for two years after the taxable year in which his spouse passes away.<sup>227</sup> An LPR schedule could be available for a similarly circumscribed time to counter any disincentive to naturalization. The ready time period that volunteers itself is five years, as many LPRs are ineligible for naturalization without five years continuous residence.<sup>228</sup> Though an imperfect metric, the law would effectively use an LPR's failure to apply for citizenship as a signal that permanence of status is of lower value to her than to an individual who applies as soon as is possible. To the extent an LPR does not value permanence of status, the benefits gulf between she and a citizen lessens.

A third objection to a different rate may come from immigrants' rights advocates. Immigrant advocacy groups frequently highlight the fact that immigrants routinely comply with tax laws, countering rhetoric that negatively casts immigrants as burdens to the fisc.<sup>229</sup> Studies support these statements, showing that immigrants contribute significantly to state and federal economies.<sup>230</sup> The tax-immigration nexus highlights the role tax compliance plays in making citizens. If LPRs or other immigrants were to pay less in taxes, the lower burden could subject an already vulnerable population to the allegation that by paying less in taxes, its members have less purchase on the right to citizenship. The inequity of taxing LPRs and U.S. citizens the same could, in other words, become buried in the rhetoric of desert. Thus, while tax policy analysis of fairness might justify a lower tax burdens for LPRs, immigration policy might intervene to stop such a reform.

As this discussion illustrates, a preferential rate schedule for LPRs is subject to objections. By providing comprehensive tax relief, as opposed to the one-off relief of a naturalization credit, however, a rate reform better respects the fact that LPRs face insecurity and disproportion-

227. I.R.C. § 2(a) (2012) (providing the definition of a surviving spouse).

228. 8 U.S.C. § 1427(a) (2012). For a helpful list of the naturalization requirements LPRs face, see U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 22, at 18–21.

229. See, e.g., Campbell, *supra* note 26 (“‘So many people say we are here burdening the country, but we are paying their retirements,’ he told me. For now, he doesn’t mind supporting the social security system, he says, but hopes one day he can reap the benefits too.”); *Do Immigrants Take American Jobs, Use Our Services Without Paying Taxes, and Cost American Taxpayers Money?*, AM. FOR IMMIGRANT JUST., [http://www.aijustice.org/do\\_immigrants\\_take\\_american\\_jobs\\_use\\_our\\_services\\_without\\_paying\\_taxes\\_and\\_cost\\_americans\\_taxpayers\\_money](http://www.aijustice.org/do_immigrants_take_american_jobs_use_our_services_without_paying_taxes_and_cost_americans_taxpayers_money) (last visited Oct. 26, 2016).

230. For a sampling of helpful studies, see HEATHER GIBNEY & PETER S. FISHER, IOWA POLICY PROJECT, IMMIGRANTS IN IOWA: WHAT NEW IOWANS CONTRIBUTE TO THE STATE ECONOMY (2014); INST. ON TAXATION & ECON. POLICY, UNDOCUMENTED IMMIGRANTS’ STATE AND LOCAL TAX CONTRIBUTIONS (2013); NAT’L ACADS. OF SCI., ENG’G, & MED., THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION (Francine D. Blau & Christopher Mackie eds., 2016).

ate punishments for tax offenses every year that they are LPRs, and that these factors are relevant to tax on horizontal equity grounds. At the same time, the fact that LPRs would remain part of the taxable community means the disciplinary or constructive role tax plays in requiring would-be citizens to act as such is not lost, nor is the basic benefit/burden bargain. Current law, by taxing LPRs on the same terms as citizens, supports the project of training citizens but fails to account for the differences between tax and formal citizens. Arguably, however, remedying one perceived inequity may give rise to another in the eyes of formal citizens to whom LPRs bear significant resemblance. The goal of this Article is not to unequivocally state that a given proposed reform is right. Rather, it is, in part, to add a new thread to the conversation on citizenship-based taxation by introducing the concept of the tax-immigration nexus and suggesting that current tax law, in light of the nexus, is too heavily weighted against LPRs.

### *C. A Note on Salience and the Tax-Immigration Nexus*

As discussed above, tweaking the tax-immigration nexus may positively impact tax compliance by enhancing the perceived fairness of the system and, thereby, its legitimacy. In this effort, the salience<sup>231</sup> of tax law to noncitizens should be further explored. New arrivals to the United States and immigrants seeking more permanent status are, or should be, very aware of the importance of tax compliance on the pathway to legal status or citizenship. Accordingly, the tax-immigration nexus creates an opportunity for tax law and policy to use this salience to support compliance among citizen and noncitizen populations. Under current law, the tax-immigration nexus casts tax in a coercive and punitive light. As we have seen, noncompliance, whether intentional or inadvertent, with tax law may result not only in penalties but grave collateral consequences.<sup>232</sup> Any of the three proposed reforms could increase immigrants' perceptions of the tax code as fundamentally fair.<sup>233</sup> By granting LPRs lower rates, a tax credit to assist with naturalization costs, or modifying reporting requirements the tax system appears to strike a balance between supporting the idea that paying taxes is an obligation of citizenship while recognizing that LPRs are not yet citizens and, as such, perhaps should not bear the full brunt of what is one of the key responsibilities of citizenship.<sup>234</sup> Such a shift could lend support to the idea that tax compliance

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231. For a recent, excellent piece on tax salience, see Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253, 254–55 (2011).

232. See *supra* Part III; see also LEVI, *supra* note 74, at 49–52 (discussing coercion and ideological compliance).

233. See, e.g., Blank, *supra* note 171, at 769–73; John T. Scholz & Neil Pinney, *Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior*, 39 AM. J. POL. SCI. 490, 490–91 (1995) (suggesting that a sense of duty to the collective plays a role in taxpayer compliance).

234. See Andrea Louise Campbell, *What Americans Think of Taxes*, in THE NEW FISCAL SOCIOLOGY, *supra* note 48, at 48, for the proposition that “taxation constitutes one of the main

is a positive expression of fiscal citizenship rather than simply a potential roadblock on the path to naturalization.<sup>235</sup> Empirical research could expand on this idea and further develop its relevance to both tax compliance and immigration policy.

### CONCLUSION

Tax and immigration law are, at first glance, two areas of law with policy goals and responsibilities that do not seem to overlap. Tax law focuses on revenue collection, albeit with extensive forays into social and economic policy. Immigration law concerns regulating who can come and go from the country and who is entitled to restricted or full membership in the national community. The Supreme Court's decision in *Kawashima v. Holder* provided a tip-off to a connection between immigration and tax. Looking further reveals the extensive tax-immigration nexus.

Citizenship is the common thread that runs through and unites these seemingly disparate subjects. Social theory teaches us that citizenship is more than formal legal status, but a practice performed by individuals to varying degrees. Utilizing this broader concept of citizenship, the number of connections between tax and immigration increases. Tracing those points of connection reveals a robust tax-immigration nexus in which immigration law relies upon tax to construct and police the requirements of formal citizenship, and tax law utilizes both a formal, immigration law-based and performative concept of citizenship to define the taxable community. Thus, these two bodies of law that appear to be relatively isolated from one another are, in fact, intimately entwined. Moreover, the depth and breadth of the tax-immigration nexus pushes us to reconsider whether the current taxation of LPRs is equitable in light of the key ways in which LPRs differ from formal U.S. citizens.

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linkages between citizens and government." Additionally, see LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 4 (2013).

235. ZELENAK, *supra* note 234, at 4. See generally Ajay K. Mehrotra, *Reviving Fiscal Citizenship*, 113 MICH. L. REV. 943 (2015) (discussing fiscal citizenship); Jill Lepore, *Tax Time: Why We Pay*, NEW YORKER (Nov. 26, 2012), <http://www.newyorker.com/magazine/2012/11/26/tax-time> ("What's surprising, given how much money and passion have been spent to defeat a broad-based, progressive income tax over the past century, and how poorly it has been defended, is that it has endured—testimony, perhaps, to Americans' abiding sense of fairness. Taxes are a pact. That pact needs renewing."). Even reforms short of a credit or rate change could engender this view. The Service could increase outreach to immigrant populations with compliance and public education programs similar to those for the Earned Income Tax Credit. Doing so would respect the role that tax law currently plays in the social project of constructing citizens.